INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
A. The Board proceedings	3
1. The representation case	3
2. The unfair labor practice case	8
B. The court of appeals' decision	8
Reasons for granting the writ	8
Conclusion	17
Appendix A	18
Appendix B	29
Appendix C	30
Appendix D	36

CITATIONS

Cases:

Equitable Life Insurance Company, 138 NLRB 529 ..... 11, 15, 16

Foreman & Clark, Inc. v. *National Labor Relations Board*, 215 F. 2d 396, certiorari denied, 348 U.S. 887 9

Harris Langenberg Hat Co. v. *National Labor Relations Board*, 216 F. 2d 146 9

May Department Stores Co. v. *National Labor Relations Board*, 326 U.S. 376 9

Metropolitan Life Insurance Co., 56 NLRB 1635 10

Metropolitan Life Insurance Co.-Cleveland, 138 NLRB 512 ..... 11, 12, 13, 14, 15, 16

730-772—64——1

Cases—Continued

	Page
Metropolitan Life Insurance Co.-Wilmington, 138 NLRB 565	4, 7, 11, 12, 13, 15, 16
Metropolitan Life Insurance Co.-Sioux City, 138 NLRB 734	11, 15
Metropolitan Life Insurance Co.-Chicago, 144 NLRB No. 15	11, 15, 16
Metropolitan Life Insurance Co. v. *National Labor Relations Board*, 328 F. 2d 820, pending on petition for a writ of certiorari, No. 982, this Term	4, 10, 11, 12, 14
Metropolitan Life Insurance Co. v. *National Labor Relations Board*, C.A. 6, No. 15,366, decided April 11, 1964	12, 13
National Labor Relations Board v. *Quaker City Life Insurance Co.*, 319 F. 2d 690	10, 11, 12, 13
National Labor Relations Board v. *Smith*, 209 F. 2d 905	9
National Labor Relations Board v. *West Kentucky Coal Co.*, 152 F. 2d 198	9
National Labor Relations Board v. *Western and Southern Life Insurance Co.*, 328 F. 2d 891	12
Quaker City Life Insurance Co., 134 NLRB 960	10, 11, 15
The Texas Pipeline Co. v. *National Labor Relations Board*, 296 F. 2d 208	9
Western and Southern Life Insurance Co., 138 NLRB 538	11, 15

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 8(a)(1)	29
Section 8(a)(5)	8, 29
Section (9a)	29
Section 9(b)	9, 29

Statute—Continued
National Labor Relations Act—Continued
Page
Section 9(c) 29
Section 9(c)(1) 29
Section 9(c)(5) 2, 8, 9, 13, 16, 29
Miscellaneous:
93 Cong. Rec. 6860 10
H. Rep. No. 245, 80th Cong., 1st Sess. 37–38 .. 10
Life Insurance Fact Book, 1962 (Institute of Life Insurance), pp. 99–100 17
Twenty-eighth Annual Report of the National Labor Relations Board (G.P.O., 1964), pp. 50–53 9

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

METROPOLITAN LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, pp. 18–27 below) is reported at 327 F. 2d 906. The findings of fact, conclusions of law, and order of the Board (J.A. 4a–6a)[1] are reported at 142 NLRB No. 60. The Board's decision and direction of election in the underlying representation proceeding (J.A. 14a–16a) are unreported.

[1] "J.A." refers to the Joint Appendix printed for the use of the court below and filed with this petition.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1964 (Appendix A, p. 28 below). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Section 9(c)(5) of the National Labor Relations Act provides that, in determining the appropriate bargaining unit, "the extent to which the employees have organized shall not be controlling." The National Labor Relations Board found that the Woonsocket, Rhode Island, district office of the Company was a separate administrative unit and therefore designated it as the appropriate unit.

The question presented is whether the court of appeals was justified in overturning the Board's selection of this unit, concededly proper on the basis of the reasons given by the agency, on the ground that the Board's definitions of the appropriate unit in six other cases involving employers in the insurance industry, each approving a unit proposed by the union, established that in all seven cases the Board had given controlling consideration to the extent of union organization.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix B, p. 29 below.

STATEMENT

A. THE BOARD PROCEEDINGS

1. *The Representation Case.*—On July 9, 1962, the Insurance Workers International Union, AFL–CIO ("the Union") filed a representation petition with the Board pursuant to Section 9(c) of the Act, requesting certification as the bargaining representative of the debit insurance agents at Metropolitan Life Insurance Company's district office in Woonsocket, Rhode Island (J.A. 1a, 15a, note 2). The Woonsocket office is in the New England Territory which encompasses Maine, Vermont, New Hampshire, Massachusetts, and Rhode Island. There are 75 district offices in this territory, employing 1,753 agents. The Company has 8 district offices, plus two detached offices which are under the administrative supervision of district offices, in the State of Rhode Island. These Rhode Island offices employ 219 agents, of whom the Woonsocket office employs 23. The nearest district office to Woonsocket is in Pawtucket, twelve miles away (J.A. 176a–178a).

At the hearing, the Company took the position that the unit sought by the Union was inappropriate, and that only the following could constitute an appropriate unit: (1) all the Company's offices in the United States; (2) all its offices in the New England Territory; or (3) all its offices in the State of Rhode Island (J.A. 15a, 31a–32a). The parties stipulated that the record in a prior representation case (Case No. 4–RC–4865) involving the Company's offices in Wilmington,

Delaware,[2] be incorporated by reference into the record in this case, with certain modifications (J.A. 27a, 175a–183a). The record thus incorporated reveals the following concerning the Company's general operations:

The Company, a New York corporation with its "home office" in New York City, is engaged in the sale and issuance of insurance policies throughout the United States and Canada (J.A. 30a, 38a). It maintains numerous district offices, and, for administrative purposes, it has divided its offices in the United States into 14 territorial divisions (J.A. 39a–40a, 46a–47a). Each division is headed by a "superintendent of agencies" who reports directly to a Company vice president (J.A. 40a). The Company's operations are highly centralized and all matters of general overall business policy—relating to the terms and conditions of various policies as well as to the management of the district offices and supervision of agents—are determined at the New York home office (J.A. 38a–39a, 49a, 53a). The superintendents of agencies, who operate out of the home office, are responsible for implementation of these Company poli-

[2] In that case, the Board found that the Company's two district offices in the Wilmington metropolitan area constituted an appropriate unit and directed an election in that unit. *Metropolitan Life Insurance Co.*, 138 NLRB 565 (reprinted in Appendix C, pp. 30–35 below). The Union won the election in the Delaware case, and the Board's subsequent order requiring the Company to bargain with the Union was enforced by the Third Circuit. *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 328 F. 2d 820, pending on petition for a writ of certiorari, No. 982, this Term.

cies and procedures in their particular territories (J.A. 39a–49a). In the course of their duties they make periodic visits to many of the offices in their areas (J.A. 122a–123a, 39a–42a).

Each district office is operated under the supervision of a manager who is directly responsible to the superintendent of agencies of his territory (J.A. 47a). The manager is, in the words of A. Rogers Maynard, the Company's second vice president, the "chief executive of his particular district" (J.A. 164a). He is the "principal line officer in the district" and holds immediate supervisory authority over the agents in the office (J.A. 165a–166a, 47a–49a, 64a, 105a–107a). A percentage of a manager's compensation is geared to the business done by his office as a whole; the remainder of his compensation is based on a fixed salary and commissions on policies he himself sells (J.A. 103a–105a).

While a manager does not have authority formally to hire agents for his district, he normally solicits applications for openings as they arise and then conducts a personal interview and orders retail credit and medical reports on the applicant (J.A. 54a–55a, 97a–100a, 158a–168a). If the manager decides that the applicant is likely to become a satisfactory agent, he forwards his recommendation and the individual's application to the superintendent of agencies for final decision; the manager's recommendation is followed approximately 75 percent of the time (J.A. 54a–55a, 97a–100a). After undergoing initial training for a period of two weeks in New York, the new agent receives additional training under the guidance and

730-772—64——2

direction of the assistant manager and manager in his district (J.A. 55a–56a, 65a–66a, 93a).

Although the agent spends the greater part of his time selling insurance in his assigned territory, he is required to report to the district office twice a week[3] and whenever else the manager directs (J.A. 51a–53a, 65a–66a, 85a–87a). A regular review is made of the agent's performance by the manager,[4] who, although he cannot discharge the agent, can recommend the latter's discharge to the superintendent of agencies and may accept an agent's resignation (J.A. 57a–59a, 63a–65a, 128a). In addition, the manager may order an audit of the agent's accounts whenever he believes it necessary; if there is a deficiency of $75 or more the manager is required to suspend him until further notice (J.A. 64a–65a, 130a–131a).

All labor relations policies are established at the home office, and all agents are subject to the same wage policies, employee benefits, and working conditions. There is virtually no interchange or transfer of agents among the various district offices, and there is no business or social contact among agents except

[3] At these times the agent attends regular meetings conducted by the manager to explain the latest Company directives, and he deposits premiums, turns in applications for policies, and picks up mail and other communications (J.A. 63a–65a).

[4] The manager is authorized to discuss "all matters pertaining to the general performance of their [the agents'] work, particularly with respect to the quality and quantity of insurance canvassed for and procured, the general accuracy with which they keep their books, records, and accounts, the diligence with which they conserve the Company's business, and assist holders of policies of the Company in realizing the benefits provided by their policies" (J.A. 63a–65a).

on the level of the individual district office. All bidding for open agencies is limited to the agents of the particular district office where the opening occurs (J.A. 66a–68a).

Upon these facts, the Board concluded in the *Wilmington* case that "the individual district office is in effect a separate administrative entity through which the Employer conducts its business operations, and therefore is inherently appropriate for purposes of collective bargaining." 138 NLRB at 567 (Appendix C, p. 33 below). It further pointed out that, although a single district office was an appropriate unit, this did "not preclude the grouping of such offices where such grouping is justified by cogent geographic considerations," *Ibid.* Accordingly, in that case, the Board grouped the Company's two district offices in the Wilmington metropolitan area into one unit, but excluded the Company's other district office in Delaware, located at Dover, 46 miles from Wilmington, *Id.* at 566–567 (Appendix C, pp. 31, 33–34 below). Applying these principles here, the Board held that the employees located at the Woonsocket district office constituted an appropriate bargaining unit. The Board said that the nearest district office to Woonsocket was one in Pawtucket, 12 miles away (J.A. 15a, note 2, 188a). It accordingly directed an election among the debit insurance agents at the Company's Woonsocket district office, to determine whether they desired the Union as their representative (J.A. 15a–16a). The Union won the ensuing election and was certified by the Board as the bargaining representative (J.A. 8a).

2. *The Unfair Labor Practice Case.*—Following certification, the Union wrote to the Company on December 4, 1962, requesting that it bargain with the Union as representative of the employees in the Woonsocket office. On December 11, 1962, the Company answered that it would not recognize and bargain with the Union because the Board's unit determination was erroneous (J.A. 8a). The Union thereupon filed unfair labor practice charges with the Board. The Board, adhering to its prior unit determination, held that the Company violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union (J.A. 4a, 9a). The Board directed the Company to cease and desist from its unfair labor practices, to bargain with the Union upon request, and to post appropriate notices (J.A. 5a, 9a–10a).

B. THE COURT OF APPEALS' DECISION

The court of appeals declined to enforce the Board's order. In its view the Board, in finding that the Woonsocket district office was an appropriate unit, was entirely controlled by the extent of the Union's organization, contrary to Section 9(c)(5) of the Act (Appendix A, pp. 18–27 below).

REASONS FOR GRANTING THE WRIT

Although the question of law presented is a narrow one, the decision below conflicts, in both reasoning and result, with decisions in the Third, Fourth, and Sixth Circuits. This conflict unsettles the administration of the National Labor Relations Act with respect to hundreds of thousands of employees in the

insurance industry. It should therefore be resolved by this Court.

1. Section 9(b) of the Act empowers the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." In determining what is the appropriate unit in a particular case, the Board, with court approval, has customarily looked to such factors as the community of interest among the employees sought to be represented; whether they comprise a homogeneous, identifiable, and distinct group; the previous history of bargaining; and the geographic proximity of various parts of the employer's operation.[5] Section 9(c)(5), which was added to the Act in 1947, was not intended to invalidate units which would satisfy those traditional tests of appropriateness; it was designed merely to preclude units which could be explained on no ground other than the extent of the union's organization. Thus, the language of Section 9(c)(5) simply provides that "the extent to which the employees have

[5] *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 380; *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 406 (C.A. 9), certiorari denied, 348 U.S. 887; *Harris Langenberg Hat Co.* v. *National Labor Relations Board*, 216 F. 2d 146 (C.A. 8); *The Texas Pipeline Co.* v. *National Labor Relations Board*, 296 F. 2d 208, 212–213 (C.A. 5); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 202 (C.A. 6); *National Labor Relations Board* v. *Smith*, 209 F. 2d 905 (C.A. 9); Twenty-eighth Annual Report of the National Labor Relations Board (G.P.O. 1964), pp. 50–53.

organized shall not be controlling" (emphasis added). *National Labor Relations Board* v. *Quaker State Life Insurance Co.* 319 F. 2d 690, 694 (C.A. 4); *Metropolitan Life Insurance Co.* v. *National Labor Relations Board,* 328 F. 2d 820, 825–826 (C.A. 3), pending on petition for a writ of certiorari, No. 982, this Term.[6] See also H. Rep. No. 245, 80th Cong., 1st Sess. 37–38, 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O. 1948) 328–329; 93 Cong. Rec. 6860, 2 Leg. Hist. 1625.

In *Metropolitan Life Insurance Co.,* 56 NLRB 1635 (1944), the Board ruled that it would not establish units of insurance agents less than state-wide or company-wide in scope. In 1961, however, in *Quaker City Life Insurance Co.,* 134 NLRB 960, this policy was reversed. The Board held that it would apply the same principles in establishing bargaining units for insurance agents as it did for employees in other industries, and would find units less than state-wide or company-wide in scope to be appropriate if such units were justified under traditional unit criteria. Thus, in *Quaker City* itself, the Board, finding that the district office was a distinct administrative division of the insurance company,[7] concluded that

[6] The government is filing a memorandum in the *Metropolitan* case—which raises the same issue as the present case—stating that it does not object to the grant of the petition for certiorari in that case if certiorari is also granted here.

[7] The Board emphasized "the day-to-day operation of the district office * * *, the overall immediate supervision by the district manager, the lack of contact or interchange among employees of the various district offices, and the absence of any administrative subdivision between the home office and the district office * * *." 134 NLRB at 962.

the insurance agents in a single district office constituted an appropriate bargaining unit, and directed an election in that unit. Applying the *Quaker City* policy, the Board has found a single district office to constitute an appropriate unit in the instant case (J.A. 14a) and in *Western and Southern Life Insurance Co.*, 138 NLRB 538. It has also found, under that policy, that units consisting of several district offices are appropriate where the union requests them and they comprise a separate and distinct geographic area. See *Metropolitan Life Insurance Co.-Wilmington*, 138 NLRB 565 (two district offices in Wilmington, Delaware); *Metropolitan Life Insurance Co.-Cleveland*, 138 NLRB 512 (six district offices in Cleveland, Ohio, and three suburban offices); *Metropolitan Life Insurance Co.-Sioux City*, 138 NLRB 734 (one district office in Sioux City, Iowa, and two detached offices in Fargo, North Dakota, and Sioux Falls, South Dakota); *Metropolitan Life Insurance Co.-Chicago*, 144 NLRB No. 15 (all of the 33 district offices in Chicago); *Equitable Life Insurance Co.*, 138 NLRB 529 (two district offices in Cleveland and a detached office in Lorain, Ohio).

The Board's application of its *Quaker City* policy in the insurance industry has been approved by the Courts of Appeals for the Third, Fourth, and Sixth Circuits. *National Labor Relations Board* v. *Quaker City Life Insurance Co., supra*, 319 F. 2d 690 (C.A. 4), sustaining the single district office unit established in 134 NLRB 960; *Metropolitan Life Insurance Co.* v. *National Labor Relations Board, supra*, 328 F. 2d 820 (C.A. 3), sustaining the unit of two district offices

established in *Metropolitan-Wilmington*, 138 NLRB 565; *National Labor Relations Board* v. *Western and Southern Life Insurance Co.*, 328 F. 2d 891 (C.A. 3), sustaining the single district office unit established in 138 NLRB 538;[4] *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, C.A. 6, No. 15366, decided April 11, 1964, sustaining the unit of six city district offices and three suburban offices established in *Metropolitan-Cleveland*, 138 NLRB 512.

2. The result reached by the court below directly conflicts with the decisions of the Third and Fourth Circuits in the *Western and Southern* (separate units in McKeesport and Wilkinsburg, Pennsylvania) and *Quaker City* (a unit in Alexandria, Virginia) cases, where units consisting of single district offices were sustained. Here, on substantially identical facts—the sole district office of an insurance company in a particular city—the First Circuit overturned the Board's determination.

The decision below also conflicts in its essential reasoning with decisions of other circuits in cases involving bargaining units in the insurance industry. The Board found that the Woonsocket office was a separate unit on the ground that the Company's district offices constituted separate administrative entities. It said that such offices may not be grouped where "there is no recent history of collective bar-

[4] The Third and Sixth Circuit's opinions in *Western and Southern Life Insurance Co.* and *Metropolitan-Cleveland* are reprinted in Appendix D, pp. 36–42. The Third Circuit's opinion in *Metropolitan-Wilmington* is reprinted in the petition in that case (No. 982, this Term).

gaining, no union seeking a larger unit, and the district office sought is located in a separate and distinct geographical area * * *" (J.A. 15a, note 2).[9] None of these criteria—except for the factor that no union was seeking a larger unit—has anything to do with the extent of the union's organization.

The court below did not find that the unit determined by the Board was inappropriate under the criteria stated in the Board's opinion. Instead, the court denied that the Board had actually applied those criteria in exercising its discretion. The court found that the Board had in fact considered the extent of organization as controlling, contrary to Section 9(c)(5). The court reasoned (1) that in the seven insurance cases beginning with *Quaker City* the Board had invariably determined that the appropriate unit was that requested by the union; (2) that those decisions could not be reconciled on the basic of geographic criteria; and (3) that the union here had requested the district office unit only after an unsuccessful attempt to organize on a broader basis.

In the *Metropolitan-Wilmington* and *Metropolitan-Cleveland* cases, *supra*, the Third and Sixth Circuits considered the identical argument, made by the same employer, and rejected it upon the ground that the Board's decisions were based upon the reasons stated

[9] The Board also stated that it was applying the standards set forth in its decision in the *Metropolitan-Wilmington* case which outlined the facts covering the Company's district offices and explained why each office would constitute an appropriate unit (see pp. 3–4, 7, above). Further, it noted that the next nearest district office to Woonsocket was in Pawtucket, 12 miles away.

730-772—64——3

in its opinions and did not make extent of organization controlling. Similarly, in both the *Metropolitan-Wilmington* and *Metropolitan-Cleveland* cases, the courts of appeals rejected the view that the union's reason for proposing a unit was relevant in assessing the validity of the unit ultimately established by the Board.[10] As the Third Circuit stated in the *Metropolitan-Wilmington* case (328 F. 2d at 826):

> Whether the employees were controlled by the extent of their organization when they petitioned the Board is not the issue. Rather, it is whether the Board in determining a unit's appropriateness was so controlled.

Thus, on both of these grounds the decision below conflicts with those in two other circuits.

3. The Board's unit determinations in insurance cases follow a logical course entirely consistent with the statute. It is elementary that there may be more than one appropriate unit, *i.e.*, that there may be more than one way in which the employees of a given employer appropriately may be grouped for purposes of collective bargaining under traditional criteria for determining the bargaining unit. This is true in the insurance industry. The Board's position is that, since the individual district office constitutes a separate administrative unit analogous to the plant unit of a multi-plant industrial concern, it is an appropriate unit and will therefore be certified un-

[10] The court below relied on evidence in the record in the *Metropolitan-Cleveland* case, which was incorporated by stipulation in the record in this case, in order to show the policy of the union here (Appendix A, p. 27 below).

less there are other factors, consistent with traditional unit criteria, which justify joining two or more district offices in a single unit. In the *Quaker City, Western and Southern Life*, and present cases the Board established units consisting of single district offices, since there was no basis for combining offices. The *Metropolitan-Sioux City* case belongs in this group; the unit comprised a single district office and its detached sub-offices because the detached offices are administered as part of the district office.

A unit composed of two or more district offices is also an appropriate unit where there is a reasonable degree of geographical coherence. If the offices are not too distant and their areas are adjacent (or at least not too widely separated), then, in the absence of any strong opposing considerations, the conventional factors for determining an appropriate unit would make a combination appropriate. In such cases—where either the district office or a combination of offices might be found "appropriate" on the basis of factors other than the extent of organization—the Board takes the union's request into account in deciding which to certify. There is little sense in putting adjacent offices, organized by the same union, within different bargaining units where a combination would be equally appropriate, and, if enough offices in a city or metropolitan area are organized, it would be reasonable to combine the group in a single unit.

This was the course followed by the Board in combining two or more district offices in a single unit in the *Equitable Life, Metropolitan-Wilming-*

ton, Metropolitan-Cleveland, and Metropolitan-Chicago cases. The unit in *Equitable Life* consisted of that company's only two offices in Cleveland and a detached office in Lorain, Ohio, which was not a separate entity. The *Wilmington* ruling combined the only two offices in the city; the only other office in the State was geographically separated. In the *Chicago* case the Board joined all the offices within the city. In the *Cleveland* case the Board combined all the offices within the city with suburban offices much closer to the center of the city than many of the suburban offices excluded from the Chicago unit.[11]

Section 9(c)(5) prohibits only the establishment of bargaining units lacking justification in other traditional criteria. Both the words of the statute and the legislative history show plainly that Congress did not intend to exclude consideration of the extent of employee organization. See pp. 9–10 above. It was, therefore, permissible for the Board to take this factor into account, along with others, in deciding whether to certify single district offices or a combination of districts as the bargaining unit.

4. The determination of bargaining units for agents in the insurance industry is of considerable import-

[11] In the Cleveland case, the three suburban offices included were situated 8 or 9 miles from the center of the city. 138 NLRB at 514. In the Chicago case, to include all of the offices in the Chicago metropolitan area would have required including district offices as far away as 39 miles from the center of the city. In contrast, the unit chosen, consisting of the 33 district offices within the political limits of the city and excluding the 14 suburban offices, produced a relatively compact grouping, with all offices within 14 miles of the center of the city. See Company Exhibit 3A–3B in *Metropolitan-Chicago*, 144 NLRB No. 15, Case No. 13–RC–9051.

ance in the administration of the Act. In 1960, there were 1,444 life insurance companies in the United States, employing about 475,000 persons, approximately one-half of whom were agents. *Life Insurance Fact Book*, 1962 (Institute of Life Insurance), pp. 99–100. The Board has rendered formal decisions in about 20 cases involving the *Quaker City* policy beginning in 1961 and the policy has been applied by the Board's regional directors in many other insurance cases. The decision of the court below unsettles this policy. For the court determined that the Board's decisions in the insurance field are invalid because, despite the statements in the Board's opinions to the contrary, they are based on the extent of the union's organization. A decision so affecting a substantial industry, at least in the First Circuit, warrants review by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

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MAY 1964.

APPENDIX A

United States Court of Appeals for the First Circuit

No. 6154

METROPOLITAN LIFE INSURANCE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION TO REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

OPINION OF THE COURT

February 17, 1964

WOODBURY, *Chief Judge.* On petition of Insurance Workers' International Union, AFL-CIO, the National Labor Relations Board in a proceeding under § 9(c) of the Act, 29 U.S.C. § 159(c), certified the Union as the bargaining representative of all debit insurance agents, including all canvassing regular and office account agents, at Metropolitan Life Insurance Company's district office in Woonsocket, Rhode Island. The Company deliberately refused to bargain collectively with the Union in order to challenge the appropriateness of the employee unit certified by the Board. See *American Federation of Labor* v. *NLRB,* 308 U.S. 401, 411 (1940); *Pittsburgh Plate Glass Co.* v. *NLRB,* 313 U.S. 146, 154 (1941). The Company

agrees with the Board's classifications of employees included and excluded. That is to say, the Company does not contend that the unit certified by the Board contains ineligible employees or employees whose interests are antagonistic. Its contention is that an employee unit consisting of the debit insurance agents working out of only its one Woonsocket district office is inappropriate. Its position is that the only appropriate unit would encompass either 1) all of its offices in the United States, or 2) all of its offices in its New England Territory (Maine, New Hampshire, Vermont, Massachusetts and Rhode Island), or 3) all of its offices in Rhode Island. Furthermore, it says that in determining that the debit insurance agents at only one of its eight district offices in Rhode Island constituted an appropriate unit for collective bargaining, the Board treated as controlling the extent to which the Union had so far organized its employees in Rhode Island in clear violation of § 9(c)(5) added to the National Labor Relations Act by the Labor Management Relations Act, 1947, 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(5), quoted in its pertinent context in the margin.[1]

The Board's policy for determining appropriate bargaining units of debit insurance agents has not been consistent over the years. In *Metropolitan Life*

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[1] Sec. 9.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

* * * * * *

"(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

Ins. Co., 56 NLRB 1635 (1944), the Board announced that, departing from its previous policy, it would in the future, in the absence of unusual circumstances, avoid setting up units of debit insurance agents smaller than state-wide in scope. It said:

> "Based upon the extent of organization among employees of an employer, we have frequently found appropriate for bargaining purposes small groups of employees with a provision for revision of a unit upon a later showing of broader organization. We believe, however, that the principle upon which we have set up such units is not controlling in the instant case. Organization among insurance agents is comparatively recent, but is steadily growing. The tendency of such organization is toward State-wide units. * * * Thus, the rapid growth of union organization among insurance agents makes it clearly appear that provisional units less than State-wide in scope are, under ordinary circumstances, unnecessary to make collective bargaining reasonably possible for them if they desire it. Accordingly, we are of the opinion that, in the absences of unusual circumstances, the practice of setting up units for insurance agents smaller that [sic] State-wide in scope should be avoided. In the instant case, since the * * * [unions] are all actively engaged in a broad organizational program in Ohio, and since it may reasonably be anticipated that one of these organizations may in the near future extend its membership to State-wide proportions, we are of the opinion that it will not effectuate the policies of the Act to set up city-wide units for employees of the Company in Ohio at this time." *Id.* at 1639–1640.

In 1961 a majority of the Board in *Quaker City Life Ins. Co.*, 134 NLRB 960, changed the policy the Board had established in the *Metropolitan Life Ins.*

Co., case in 1944 by determining that the debit insurance agents of Quaker City's one district office in Alexandria, Virginia, constituted an appropriate bargaining unit. The majority in the *Quaker City* case quoted from the language quoted above from the *Metropolitan Life* case and said:

> "Clearly this language of the *Metropolitan Life* case indicates that the rule was adopted *solely* in anticipation of broader organization on a companywide or statewide basis, which at that time seemed imminent. As a practical matter, however, such statewide or companywide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance agents to an extent certainly never contemplated by the Act, or for that matter, by the Board that decided the *Metropolitan Life* case. There is no longer any rational basis for applying different rules of organization to the insurance industry than are applied to other industries. The rule was adopted for the purpose of permitting organization on a statewide or employerwide basis, which did not develop as anticipated. Contrary to our dissenting colleagues, we regard this as a valid reason for changing the rule. Obviously, when the purpose for which a rule has been established fails, the rule should also fail. This is especially so with respect to a rule which unfairly prejudices the collective-bargaining rights of employees. Accordingly, in the future, the Board's policy will be not to preclude the organization of insurance agents into units of less than employerwide or statewide scope, and we shall apply our normal unit principles to the cases as they arise. In the instant case, upon the record as a whole, and especially in view of the autonomous day-to-day operation of the district office here, the overall immediate supervision by the district manager, the lack of

> contact or interchange among employees of the various district offices, and the absence of any administrative subdivision between the home office and the district office, we find the district office unit to be appropriate."
>
> *Quaker City Life Ins. Co.*, 134 NLRB 960, 962 (1961).

The two dissenting members of the Board said that they could see "no valid reason for departing from the *Metropolitan Life* rule which the Board adopted in 1944." *Id.*

The United States Court of Appeals for the Fourth Circuit, Judge Boreman dissenting, enforced an order of the Board requiring Quaker City Life Insurance Company to bargain collectively with the same union involved herein as the bargaining representative of the unit certified by the Board in its underlying representation proceeding. *NLRB* v. *Quaker City Life Insurance Company*, 319 F. 2d 690 (C.A. 4, 1963), *enforcing* 138 NLRB 61 (1962).

In subsequent cases a majority of the Board, with the same two members dissenting, certified as appropriate units consisting of nine of Metropolitan's district offices in the Cleveland, Ohio, metropolitan area (six offices in the City and three suburban offices eight or nine miles distant), *Metropolitan Life Ins. Co.*, 138 NLRB 512 (1962), [unfair labor practice decision, 141 NLRB No. 96 (1963)] *on appeal to Sixth Circuit*, Case No. 15366; two of Metropolitan's three district offices in Delaware, *Metropolitan Life Ins. Co.*, 138 NLRB 565 (1962), [unfair labor practice decision, 141 NLRB No. 37 (1963)] *on appeal to Third Circuit*, Case No. 14390; Metropolitan's single district office in Sioux City, Iowa, together with two detached offices under its administrative control in Fargo, North Dakota, and Sioux Falls, South Dakota, 284 and 120

miles distant, respectively, from Sioux City, *Metropolitan Life Ins. Co.*, 138 NLRB 734 (1962); and all of Metropolitan's district offices within the political limits of the City of Chicago, thereby excluding suburban offices even though six of the thirty-three city district offices had territories extending beyond the city limits and three of the fourteen suburban offices had territories extending into the city. *Metropolitan Life Ins. Co.*, 144 NLRB No. 15 (1963). In *Equitable Life Ins. Co.*, 138 NLRB 529 (1962), the Board determined appropriate a unit consisting of two district offices in Cleveland, Ohio, with a detached office in Lorain, Ohio, 28 miles away. And in this case the Board majority relying on prior decisions determined that one district office out of eight in a small densely populated state constituted an appropriate bargaining unit. The two dissenting members of the Board merely referred to their dissents in the *Quaker City Life Ins. Co.* case and in others in which they had not only reiterated that they saw no reason to depart from the policy established in the *Metropolitan Life* case of 1944, but had said that it appeared to them that the majority's unit determination was based upon the union's extent of organization of the debit agents involved.

We are very well aware that § 9(b) of the Act confers such broad discretion on the Board that a unit determination by it "if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947); *International Typographical Union Local 38* v. *NLRB*, 278 F. 2d 6, 10 (C.A. 1, 1960), *aff'd in part, rev'd in part*, 365 U.S. 705 (1961). But we would be remiss in our duty as an enforcing court should we overlook or ignore an evasion by the Board of the command laid upon it by § 9(c)(5), *supra*.

We are seriously handicapped in this case by the Board's failure to articulate specific reasons for its unit determination. It merely said in a footnote to its decision and direction of election:

> "The Employer has eight district offices and two detached offices in Rhode Island, and has only one district office in Woonsocket. The nearest district office is located 12 miles away in Pawtucket. In the prior proceeding in Case No. 4–RC–4865, based on the same record incorporated by reference herein, we found that each of Employer's individual offices was in effect a separate administrative entity through which the Employer conducted its business operations, and therefore was inherently appropriate for purposes of collective bargaining. See *Metropolitan Life Insurance Company,* 138 NLRB No. 73.[2] Applying the tests set forth therein, we find that, since there is no recent history of collective bargaining, no union seeking a larger unit, and the district office sought is located in a separate and distinct geographical area, the employees located at the Woonsocket district office constitute an appropriate unit. See also *Metropolitan Life Insurance Company,* 136 NLRB No. 87."[3]

Not only do the cases cited by the Board majority not directly support its decision, but also the criterion of location in a separate and distinct geographical

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[2] This is Case No. 4–RC–4865 reported 138 NLRB 565 (1962) in which the Board majority determined that two of Metropolitan's three district offices in Delaware constituted an appropriate bargaining unit.

[3] This is a mis-citation. No. 87 is reported 138 NLRB 734 and is the decision in which the Board majority determined that Metropolitan's single district office in Sioux City, Iowa, together with its two detached offices in Fargo, North Dakota, and Sioux Falls, South Dakota, constituted an appropriate bargaining unit.

area is not a criterion consistently applied by the Board as its decisions in Metropolitan's Cleveland and Chicago cases cited herein above clearly demonstrate.

In the Chicago case the Board majority said:

> "While 6 of the employer's 33 offices in the city of Chicago have territories extending beyond the city limits, and 3 of the 14 suburban offices have territories extending into the city, we do not regard this factor as undermining the appropriateness of a unit confined to the city because the territorial boundaries of district offices may be subject to frequent change. Because of this, the Board has relied not upon territorial boundaries but upon the physical location of the individual offices as the yardstick in determining the geographic appropriateness of the unit." *Metropolitan Life Ins. Co.*; 144 NLRB No. 15 (1963).

At first blush there is a certain plausibility to this reasoning despite doubts that city boundaries provide a more satisfactory basis for determining a separate and distinct geographical area than do the business-prescribed areas delegated to each company office or the metropolitan area which has developed through natural growth.[4] Plausibility fades, however, upon consideration of Metropolitan's Cleveland case wherein the Board majority had previously decided that the Cleveland metropolitan area constituted an ap-

[4] As the dissenting members said: "If the appropriateness of insurance agents' units is to be determined by geographic considerations, we think it would be more reasonable to be guided by the metropolitan, or natural, confines of a geographic area, rather than the political limits of a city which are artificial and may be arbitrarily drawn * * *." *Id.*

propriate unit and certified a combination of six offices in the city and three in the suburbs, *Metropolitan Life Ins. Co.* 138 NLRB 512 (1962). Why there should be a community of interest among Metropolitan's agents working from both city and suburban offices in Cleveland but no community of interest among its agents working in both city and suburban offices in Chicago is not explained by the Board majority and is beyond our comprehension.[5]

The Board majority in this case did not discuss what weight, if any, it gave to the factor of extent of union organization. Nor indeed has the majority done so in any of its decisions since *Quaker City*.[6]

Looking at its actions, however, we have not found a single instance since *Quaker City* wherein the majority of the Board refused the debit insurance agent unit petitioned for by the Union. We would not consider this fact alone decisive for we would hesitate

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[5] The Regional Director apparently had the same difficulty for he concluded that it would be improper to limit the unit to offices located within the city limits of Chicago because such a unit would include certain areas in the suburbs and exclude certain other areas in the city. Therefore he directed an election by the employees in all of Metropolitan's offices in the greater Chicago area. *Metropolitan Life Ins. Co.*, 144 NLRB No. 15 (1963).

[6] Judge Boreman in his dissent in that case at page 696 found more than a hint that extent of union organization was again dominant in the Board's thinking. He wrote: "Indeed * * * the Board in stating the rationale of its determination to reverse the policy decision in Metropolitan, clearly indicates that its newly adopted policy is, in reality, based upon the extent of organization factor when it now says that the 'language of the Metropolitan Life case indicates that the rule was adopted *solely* in anticipation of broader organization on a company or state-wide basis, which at that time appeared imminent,' but that 'as a practical matter, however, such state or company-wide organization has not materialized.'"

to assume that the Board was subservient to the Union. Yet we believe this fact is entitled to considerable weight in the light of the testimony of the Union's vice-president in Metropolitan's Cleveland case, *supra,* which was incorporated by stipulation in the record in the instant case, that if the Union did not succeed in organizing on a broader basis it would as a matter of policy petition for a unit "on a district basis." Indeed it is apparent that the Union followed this policy in the present case for in May and June 1962 it had engaged in organizational activities among agents attached to all of the Company's 8 district offices and 2 detached offices in Rhode Island, and it was only after lack of success in its state-wide attempt that it sought and received the Board's acceptance of the single district office in Woonsocket.

In short, the Union naturally wants units in which it can win elections and on the basis of the Board majority's actions, which speak more clearly than its words, it seems to us evident that in this case the Board majority in keeping with its apparent practice in recent years has given the Union the unit it wants. In the absence of any statement by the Board majority of any other rational basis for its varying unit determinations, we can only conclude that the two member Board minority is correct in its charge that the majority has indeed reverted to its pre-1944 policy of regarding the extent of union organization as controlling in violation of § 9(c)(5) of the Act.

A decree will be entered setting the Board's order aside and denying the Board's cross-petition for enforcement.

DECREE

February 17, 1964

This cause came on to be heard upon petition to review and set aside and cross-petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board of May 7, 1963, is hereby set aside, and the Board's cross-petition for enforcement is denied.

By the Court:

ROGER A. STINCHFIELD,
Clerk.

By /s/ *Dana H. Gallup,*
Chief Deputy Clerk.

Approved:
/s/ PETER WOODBURY,
Ch. J.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—.

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * * * *

APPENDIX C

United States of America Before the National Labor Relations Board

Case No. 4–RC–4865

METROPOLITAN LIFE INSURANCE COMPANY, EMPLOYER

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL–CIO, PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Joseph F. Rosenthal, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record[1] in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer with-

[1] Because, in our opinion, the record and briefs adequately set forth the issues and positions of the parties, the Employer's request for oral argument is hereby denied. Also, for the reasons hereinafter stated, the Employer's motion to dismiss the petition on the grounds that the unit petitioned for is inappropriate is hereby denied.

in the meaning of Section 9(c)(1) and Section 2 (6) and (7) of the Act.

4. The appropriate unit:

The Petitioner seeks a unit of the Employer's two district offices located in the Wilmington, Delaware, metropolitan area. The Employer contends that the appropriate unit should consist of either (1) all its offices in the United States; (2) all offices in its Atlantic Coast Territory; or (3) all its offices in the State of Delaware. Otherwise, the parties are in agreement as to the composition of the unit.

The Employer is engaged in the sale and issuance of various types of insurance policies and does business throughout the United States and Canada. It maintains its principal office in New York, New York, and for administrative purposes, it has divided its offices throughout the United States into 14 territorial divisions. Each such division is headed by a superintendent of agencies who reports directly to a Company vice president. The offices sought by the Petitioner are included in the Employer's Atlantic Coast Territory, which encompasses the States of Delaware and Maryland, the City of Philadelphia, Pennsylvania, and all of the State of New Jersey, south of the cities of Bayonne and Elizabeth.

The Petitioner's unit would include both of the Employer's district offices in the greater Wilmington, Delaware, metropolitan area. The Employer's closest office to these, and its only remaining office in the State of Delaware, is located in Dover, which is 46 miles from Wilmington. The Employer's business operations are highly centralized and policies and procedures are established at the home office which governs the management of the district office and the duties and functions of the agents. The superintendent of agencies, whose office is located in New York,

has the responsibility for seeing that the offices in his territory operate in accordance with these Company directions, and in the course of his duties, the superintendent of agencies makes periodic visits to the offices in his territory.

Each district office has a manager in charge, who is the immediate supervisory authority over the agents in the office. Agents are required by Company regulations to perform all of their work through and subject to the general supervision and direction of the manager of the district office to which they are assigned.[2] The manager normally solicits applications for openings in his district, and, although he does not have the authority to hire an individual applicant, he may recommend that such action be taken. In carrying out his function as a recruiter, the manager accepts the prospective agent's application, conducts a personal interview, and orders a retail credit and medical report. The application, together with the manager's recommendation, is then forwarded to the superintendent of agencies in New York who makes the final determination. New agents receive their initial training in New York and are then assigned to a district office where they receive additional training under the guidance and direction of the manager and assistant manager. Although the agent spends the greater part of his time in his assigned territory selling industrial and other types of insurance, he is required to report to the district office twice a week and whenever the manager so directs. One day each week is devoted to a general meeting, at which the manager explains to his agents the latest Company directives.

[2] The parties have agreed to exclude the managers and assistant managers from the unit, apparently on the theory that they are supervisors within the meaning of the Act.

The manager regularly reviews the agent's performance and although he has no authority to terminate an agent's appointment, the manager may accept the agent's resignation, if tendered, or he may recommend to the superintendent of agencies that the agent be terminated. The manager may order an audit of the agent's accounts whenever he feels it is necessary, and in the event of a deficiency of 75 dollars or more in the agent's accounts, the manager is required to suspend him until further notice.

All labor relations' policies are established at the home office and all agents are subject to the same wage policies, employee benefits and working conditions. All bidding on job openings is limited to the agents of the particular district office where the opening occurs. There is virtually no interchange or transfer of agents among the various district offices and there is no business or social contact among agents except on the individual district office level. There is no history of collective bargaining affecting the employees involved in the instant proceeding.

In view of the foregoing, and the entire record, we find that the individual district office is in effect a separate administrative entity through which the Employer conducts its business operations, and therefore is inherently appropriate for purposes of collective bargaining. However, as we have previously stated,[3] this finding does not preclude the grouping of such offices where such grouping is justified by cogent geographic considerations. Therefore, as the Petitioner is seeking a unit comprising all of the Employer's offices in a separate and distinct area, the Wilmington, Delaware, metropolitan area, and as there is no history of collective bargaining covering

[3] *Metropolitan Life Insurance Company*, 138 NLRB [512].

employees in these offices and no union seeks a broader unit, we find that such a unit may be appropriate for purposes of collective bargaining.[4]

Accordingly, we find that the following employees at the Employer's district offices in the metropolitan Wilmington, Delaware, area, including the Brandywyne and Kirkwood offices, constitute a unit appropriate for collective bargaining purposes within the meaning of Section 9(b) of the Act:

> All debit insurance agents, including all canvassing regular and office account agents selling industrial life insurance and other forms of insurance sold by the Company, but excluding independent agents, retired agents, Metropolitan Insurance consultants, managers, assistant managers, cashiers, clerical employees, secretaries, professional employees, guards, watchmen and supervisors as defined in the Act.[5]

Direction of Election

An election by secret ballot shall be conducted among the employees in the unit found appropriate, in paragraph 4 above, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such

[4] *Ibid.*

[5] The unit description appears as amended and stipulated to at the hearing.

during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Insurance Workers International Union, AFL–CIO.

Dated, Washington, D.C.

FRANK W. MCCULLOCH,
Chairman,
JOHN H. FANNING,
Member,
GERALD A. BROWN,
Member,
National Labor Relations Board.

[SEAL]

PHILIP RAY RODGERS AND BOYD LEEDOM, *members,* dissenting:

For the reasons stated in our dissenting opinions in *Quaker City Life Insurance Company,* 134 NLRB No. 114, *Metropolitan Life Insurance Company,* 138 NLRB No. 64, and *Equitable Life Insurance Company,* 138 NLRB No. 70, we would find the unit sought inappropriate and dismiss the petition.

Dated, Washington, D.C.

PHILIP RAY RODGERS,
Member,
BOYD LEEDOM,
Member,
National Labor Relations Board.

APPENDIX D

United States Court of Appeals for the Third Circuit

No. 14,616

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued February 17, 1964

Before KALODNER and HASTIE, *Circuit Judges* and KIRKPATRICK, *District Judge*

OPINION OF THE COURT

(Filed March 4, 1964)

PER CURIAM.

Metropolitan Life Insurance Company v. *National Labor Relations Board,* — F. 2d — (decided February 18, 1964) is dispositive of the issues presented.

The Order of the Board will be affirmed.

* * * * *

United States Court of Appeals for the Sixth Circuit

No. 15366

METROPOLITAN LIFE INSURANCE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AND ON CROSS PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided April 11, 1964

Before: MILLER and CECIL, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

CECIL, *Circuit Judge.* This case is before the Court upon the petition of the Metropolitan Life Insurance Company to review and set aside an order of the National Labor Relations Board, respondent, issued against the petitioner on April 2, 1963, pursuant to Section 10(c) of the National Labor Relations Act. (Section 160(c), Title 29, U.S.C.) The respondent, by answer, has requested that the order be enforced. The petitioner and the respondent will be referred to hereinafter as the Company and the Board, respectively.

The Board found that the Company violated Section 8(a) (5) and (1) of the Act (Section 158(a) (1) and (5), Title 29, U.S.C.),[1] by refusing to bargain with the union[2] certified as the representative of a group of its employees. The Board's Decision and Order is reported at 141 NLRB 1074. The sole question presented here is whether the Board's determination of an appropriate unit (Section 159(b), Title 29, U.S.C.)[3] was controlled by the extent of union organization in violation of Section 9(c)(5) of the Act. (Section 159(c)(5), Title 29, U.S.C.)[4]

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[1] "(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

[2] Insurance Workers International Union, AFL-CIO.

[3] "(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *"

[4] "(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

The unit as determined by the Board consists of nine district offices of the Company. Six of these offices are located in the city of Cleveland, Cuyahoga County, Ohio, and three are located in the metropolitan area of Cleveland. The three offices outside of the city of Cleveland are all in Cuyahoga County and are described as follows: Shaker Heights District in Cleveland Heights, Cuyahoga District in Parma and Lakewood District in Rocky River. These suburban offices are within eight or nine miles of the center of Cleveland. The nearest excluded office is in Akron, Summit County, Ohio, thirty miles from the center of Cleveland and approximately twenty-one miles from the nearest included office in Cuyahoga County.

The district offices are grouped into fourteen territorial divisions by the Company for administrative purposes. Each division is headed by a "superintendent of agencies" who reports directly to a Company vice-president. The offices here involved are in the Central Territory, a division composed of the states of Ohio, Indiana and West Virginia. The superintendent of agencies supervises the district offices in his territory. He maintains constant contact with the district offices and is responsible for: (1) the production of new business; (2) the servicing and conservation of existing business; (3) sales promotion activities; and, (4) recruiting, training, appraisal, appointment, transfer, termination, promotion, demotion and arrangement for retirement of agents, managers and assistant managers. In conjunction with the field management staff officers, he directs the creation and abolition of district offices and the alteration of boundary lines between districts. The superintendent of agencies, within his territory, has the

power to alter or amend rules, regulations and the forms of the Company.

Business policy of the Company is formulated at its home office and applied uniformly throughout the country. Applications for insurance are processed only at the home office. All business in Ohio is regulated by the state of Ohio. The Company must qualify to do business in the state and all policy forms must be approved by the State Insurance Department.

The district offices are directed by a manager and one or more assistant managers. Sales and administrative policies are prescribed by the home office and the manager has little discretionary authority. His duties are to administer the office in accordance with the policies set by the Company from its home office under supervision of the superintendent of agencies. The district manager has no final authority to hire or discharge employees or to process grievances. There is virtually no interchange or transfer of agents among the various district offices.

The Company contends that a unit should be first, the whole of the United States, or, second, an entire division, or, third, an entire state. There are about nine hundred district offices in the United States with approximately 20740 agents. In the Central Territorial Division there are sixty-eight offices with approximately 1556 agents. There are 1012 agents who work out of forty-four offices in the state of Ohio and in the nine offices here involved there are approximately 230 agents.

In 1944, the Board ruled that the smallest appropriate unit for insurance agents would thereafter be state-wide. *Metropolitan Life Ins. Co.*, 56 NLRB 1635. The Board consistently followed this standard until 1961 at which time it changed its policy and determined that a single district office was an appro-

priate unit for collective bargaining. *Quaker City Life Ins. Co.*, 134 NLRB 960. In that case the Board found that one district office in Alexandria, Virginia, was an appropriate unit. The union won an election and the Board certified it as the bargaining agent for the employees of that office. The Court of Appeals for the Fourth Circuit affirmed. *N.L.R.B.* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690.

The Third Circuit upheld the Board in its certification of two out of three district offices in the state of Delaware as an appropriate unit. *Metropolitan Life Ins. Co.* v. *N.L.R.B.*, No. 14390, decided February 18, 1964, — F. 2d —. In this case the Brandywyne and Kirkwood offices were in the Wilmington area and the third one was forty-six miles from Wilmington.

The First Circuit denied enforcement of the Board's order where one district office out of ten in Rhode Island was certified as an appropriate unit. *Metropolitan Life Ins. Co.* v. *N.L.R.B.*, 327 F. 2d 906. In this case the Board found that the district office in Woonsocket was an appropriate unit. It was twelve miles away from the nearest office of the Company which was in Pawtucket. There were eight district offices and two detached offices in Rhode Island.

The Board has followed this changed policy throughout the country.[5] The Board is not bound by a rule once adopted if it determines subsequently that the reason for the rule fails and it does not act arbitrarily, unreasonably or in violation of the Act. *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194; *N.L.R.B.* v.

[5] *Metropolitan Life Ins. Co.*, 144 NLRB No. 15, (Chicago area); *Metropolitan Life Ins. Co.*, 138 NLRB 734, (Iowa-North Dakota-South Dakota); *Equitable Life Ins. Co.*, 138 NLRB 529, (Cleveland area); *Western and Southern Life Ins. Co.*, 138 NLRB 538, (Pennsylvania).

National Container Corp., 211 F. 2d 525, C.A. 2; *Optical Workers' Union* v. *N.L.R.B.*, 227 F. 2d 687, C.A. 5, cert. den., 351 U.S. 963; *N.L.R.B* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167, C.A. 4, cert. den., 361 U.S. 943. As the court said in *Metropolitan Life Ins. Co.* v. *N.L.R.B.*, No. 14390, C.A. 3, above cited: "It was the Board's informed view that the 1944 Metropolitan rule 'unfairly prejudiced the collective bargaining rights of employees.' There is a vast difference between taking away an obstacle to wider union organization and collective bargaining which is the explicit legislative purpose of the Act, and determining appropriate units on the basis of employee organization."

The Board has the authority under the Act to determine the appropriate unit for collective bargaining. (Section 159(b), Title 29, U.S.C.) It has wide discretionary powers in this respect. What is an appropriate unit is a question of fact to be determined by the Board upon the facts of each case. Its decision will not be disturbed except for an abuse of discretion or violation of the statute. *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485; *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146; *N.L.R.B.* v. *Prudential Ins. Co.*, 154 F. 2d 385, 388, C.A. 6; *N.L.R.B.* v. *Morgantown Full Fashioned Hosiery Co.*, 241 F. 2d 913, C.A. 4.

A unit as determined by the Board may be coextensive with union organization but the Act is not violated unless extent of organization is the controlling motive of the Board in making its determination. The Board found here that the grouping of the nine offices in the Cleveland area was justified by "cogent geographic considerations." It was stated in its opinion: "Therefore, as the Petitioner is seeking a unit comprising all of the Employer's offices in a sep-

arate and distinct geographic area in the City of Cleveland, Ohio, and as there is no recent history of collective bargaining and no union seeks a broader unit, we find that such a unit may be appropriate for purposes of collective bargaining." 138 NLRB 512, 515.

We conclude that the extent of union organization was not the controlling reason for the Board's determination of an appropriate unit in this case. Geographical considerations were not "simulated grounds" but the actual basis for the Board's decision. The Board did not violate either subsection (b) or (c)(5) of Section 159, Title 29, U.S.C.

Having determined that the unit for collective bargaining as fixed by the Board is an appropriate unit it follows that the order of the Board (141 NLRB 1074) must be enforced. It is so ordered.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 98

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM ON BEHALF OF METROPOLITAN LIFE INSURANCE COMPANY

BURTON A. ZORN
Counsel for Respondent

GEORGE G. GALLANTZ
MARVIN DICKER
THOMAS F. DELANEY
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1128

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM ON BEHALF OF METROPOLITAN LIFE INSURANCE COMPANY

The National Labor Relations Board found in this case that a single district office of Metropolitan Life Insurance Company constituted an appropriate unit for collective bargaining. Insurance Workers International Union, AFL-CIO (the "Union") was certified as the bargaining representative for that unit. The Company refused to bargain with the Union, claiming that the unit determination was erroneous and beyond the Board's power.

The question thus presented was whether the Board had violated Section 9(c)(5) of the National Labor Relations Act which provides that, in determining an appropriate bargaining unit, "the extent to which the employees have organized shall not be controlling." The Court of Appeals for the First Circuit held that the Board had violated the statute and set the Board's order aside.

Of Metropolitan's eight district offices in Rhode Island, the Union succeeded in organizing only one, the one located in Woonsocket which is part of the greater Providence metropolitan area. That one office the Board found to be an appropriate bargaining unit and refused to include in the unit any of the other seven offices, all also located in metropolitan Providence.

The court below reviewed the action of the Board in the light of its actions in other insurance company cases, and concluded (327 F. 2d 906, 910-911):

> "In short, the Union naturally wants units in which it can win elections and on the basis of the Board majority's actions, which speak more clearly than its words, it seems to us evident that in this case the Board majority in keeping with its apparent practice in recent years has given the Union the unit it wants. In the absence of any statement by the Board majority of any other rational basis for its varying unit determinations, we can only conclude that the two member Board minority is correct in its charge that the majority has indeed reverted to its pre-1944 policy of regarding the extent of union organization as controlling in violation of §9(c)(5) of the Act."

Concededly, the decision below is in conflict with Third and Sixth Circuit decisions on the same issue: *Metropolitan Life Insurance Company* v. *National Labor Relations Board*, 328 F. 2d 820 (3rd Cir. Feb. 18, 1964), *cert. pending*, No. 982, this Term; *Metropolitan Life Insurance Company* v. *National Labor Relations Board*, —— F. 2d —— (6th Cir. Apr. 11, 1964). It appears also to be in conflict with *National Labor Relations Board* v. *Quaker City Life Insurance Company*, 319 F. 2d 690 (4th Cir. 1963). However, it is in accord with the dissenting opinion in the *Quaker City*

case and the dissenting opinions of members of the Board in the instant and other cases.

We submit that this conflict among Circuits warrants resolution by this Court. Metropolitan Life Insurance Company has filed a petition for certiorari in the Third Circuit case, No. 982, this Term, and intends to file a petition for certiorari in the Sixth Circuit case. If these petitions are granted, we do not oppose the granting of the present petition.

Respectfully submitted,

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June 17, 1964.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement:	
A. The Board proceedings	3
B. The court of appeals' decision	8
Summary of argument	8
Argument:	
The Board's finding that a single district office constituted an appropriate bargaining unit did not violate Section 9(c)(5) of the Act	10
A. The language and legislative history of Section 9(c)(5) demonstrate that the extent of organization may be considered by the Board so long as it is not given controlling weight	11
B. The Board's conclusion in this case was based on factors other than the extent of employee organization	15
C. The Board's decision was consistent with its recent precedents	22
Conclusion	28
Appendix A	29
Appendix B	31

CITATIONS

Cases:	
American National Insurance Co., 69 NLRB 745	23
Armour & Company, 63 NLRB 1214	12
Baltimore Life Insurance Co., The, 73 NLRB 848	23
Beaumont Forging Co., 110 NLRB 2200	19
Botany Worsted Mills, 27 NLRB 687	12
Carson Pirie Scott & Co., 63 NLRB 1096	12
C. Pappas Co., 80 NLRB 1272	14
Dixie Belle Mills, Inc., 139 NLRB 629	20
Dun & Bradstreet, Inc., 80 NLRB 56	14

Cases—Continued

	Page
E. I. DuPont de Co., 111 NLRB 649	14
Equitable Life Insurance Co., 98 NLRB 529	26
Foreman & Clark, Inc. v. *National Labor Relations Board*, 215 F. 2d 396, certiorari denied, 348 U.S. 887	15, 16
Fredericksen Motor Express Corp., 121 NLRB 32	19
General Instrument Corp. v. *National Labor Relations Board*, 319 F. 2d 420, certiorari denied, 375 U.S. 966	15, 16
Globe Brick Co., 65 NLRB 527	12
Harris, Langenberg Hat Co. v. *National Labor Relations Board*, 216 F. 2d 146	16, 17
Hercules Powder Co., 104 NLRB 259	14
Home Beneficial Life Insurance Co., 89 NLRB 392	23
Home Beneficial Life Insurance Co., 98 NLRB 1053	23
Hygrade Food Products Corp., 85 NLRB 841	19
J. L. Hudson Co., 103 NLRB 1378	14
John Hancock Life Ins. Co., 62 NLRB 240	23
Mandel Bros., 77 NLRB 512	14
May Department Stores Co. v. *National Labor Relations Board*, 326 U.S. 376	16
Metropolitan Life Insurance Co., 56 NLRB 1635	22
Metropolitan Life Insurance Co.—Chicago, 144 NLRB 149	25, 27
Metropolitan Life Insurance Co.—Chicago Heights, 148 NLRB No. 145	25
Metropolitan Life Insurance Co.—Cleveland, 138 NLRB 512	25, 27
Metropolitan Life Insurance Co. (*Cleveland*) v. *National Labor Relations Board*, 330 F. 2d 62, pending on petition for a writ of certiorari, No. 229, this Term	22
Metropolitan Life Insurance Co.—Detroit, 146 NLRB No. 184	25, 27
Metropolitan Life Insurance Co.—Holyoke, 147 NLRB No. 84	25
Metropolitan Life Insurance Co.—Meriden and New London, 147 NLRB No. 8	20, 25
Metropolitan Life Insurance Co.—Sioux City, 138 NLRB 734	25
Metropolitan Life Insurance Co.—Toledo, 146 NLRB No. 113	26, 27

Cases—Continued

	Page
Metropolitan Life Insurance Co.—Wilmington, 138 NLRB 585	4, 7, 25, 27
Metropolitan Life Insurance Co. (Wilmington) v. National Labor Relations Board, 328 F. 2d 820, pending on petition for a writ of certiorari, No. 56, this Term	4, 15, 21
Montgomery Ward & Co., 90 NLRB 609	14
Monumental Life Insurance Co., 60 NLRB 510	23
Mountain States Telephone and Telegraph Co., v. National Labor Relations Board, 310 F. 2d 478	16
Mueller Brass Co. v. National Labor Relations Board, 180 F. 2d 402	15, 17
Murray Corp., 101 NLRB 313	14
National Labor Relations Board v. Morganton Full Fashioned Hosiery Co., 241 F. 2d 913	15
National Labor Relations Board v. Quaker City Life Insurance Co., 319 F. 2d 690	15, 25, 26
National Labor Relations Board v. Salant, 171 F. 2d 292	14
National Labor Relations Board v. Smith, 209 F. 2d 905	16
National Labor Relations Board v. Smythe, 212 F. 2d 664	15, 17
National Labor Relations Board v. West Kentucky Coal Co., 152 F. 2d 198	16
New England Spun Silk Corp., 11 NLRB 852	12
NY-Lint Tool & Mfg. Co., 77 NLRB 642	20
Pacific Gas & Electric Co., 44 NLRB 665	12
Pacific Laundry Co., 99 NLRB 1011	14
P. Ballantine & Sons, 141 NLRB 1103	20
Peoples Life Insurance Co., 72 NLRB 1406	23
Pomeroy's, Inc., 76 NLRB 633	14
Quaker City Life Insurance Co., 73 NLRB 177	23
Quaker City Life Insurance Co., 134 NLRB 960	24, 25
Sanitary Farms Dairies, Inc., 107 NLRB 955	14
Sinclair Refining Co., 89 NLRB 969	14
Texas Pipe Line Co. v. National Labor Relations Board, 296 F. 2d 208	15, 16
Thalhimer Bros., Inc., 81 NLRB 1175	14

Cases—Continued

	Page
Travelers Insurance Co., The, 116 NLRB 387	23
Union Carbide and Carbon Corp. v. *National Labor Relations Board*, 244 F. 2d 672	15
United Insurance Company, 106 NLRB 843	23
Westbrook Enterprises, Inc., 79 NLRB 1032	14
Westclox, 82 NLRB 198	14
Western Automatic Machine Screw Co., 51 NLRB 1042	12
Western and Southern Life Insurance Co., 65 NLRB 855	23
Western and Southern Life Insurance Co., 138 NLRB 538	25, 26
Westinghouse Electric Corp. v. *National Labor Relations Board*, 236 F. 2d 939	15
Statute involved:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 7	29
Section 8(a)(1)	8, 29
Section 8(a)(5)	8, 29
Section 9(a)	29
Section 9(b)	11, 18, 30
Section 9(c)	3
Section 9(c)(5)	8, 9, 10, 11, 12, 13, 14, 15, 21, 26, 30
Section 9(f)(3)	12
Section 10(c)	38
Miscellaneous:	
93 Cong. Rec. 6444, 2 Leg. Hist. 1542	14
93 Cong. Rec. 6860, 2 Leg. Hist. 1625	13
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 48, 1 Leg. Hist. 552	13
H. Rep. No. 245, 80th Cong., 1st Sess., 37–38, 1 Leg. Hist. 328–329	12
Twelfth Annual Report of the National Labor Relations Board (G.P.O., 1948), p. 20	12
Twenty-eighth Annual Report of the National Labor Relations Board (G.P.O., 1964), pp. 50–53	16

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 98

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

METROPOLITAN LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals is reported at 327 F. 2d 906 (R. 5–12). The decision and order of the Board in the unfair labor practice proceeding (R. 4a–6a) are reported at 142 NLRB 491. The Board's decision and direction of election in the underlying representation proceeding (R. 14a–16a) are unreported.

JURISDICTION

The decree of the court of appeals was entered on February 17, 1964 (R. 13). The petition for a writ of certiorari was filed on May 18, 1964, and was granted on October 12, 1964 (R. 13). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and

Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. 160(e)).

QUESTION PRESENTED

Section 9(c)(5) of the National Labor Relations Act provides that, in determining the appropriate bargaining unit, "the extent to which the employees have organized shall not be controlling." The National Labor Relations Board found that the Woonsocket, Rhode Island, district office of the Company was a separate administrative unit and therefore designated it as the appropriate unit.

The question presented is whether the court of appeals was justified in overturning the Board's selection of this unit, concededly proper on the basis of the reasons given by the agency, on the ground that the Board's definitions of the appropriate unit in six other cases involving employers in the insurance industry, each approving a unit proposed by the union, established that in all seven cases the Board has given controlling consideration to the extent of union organization.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A, pp. 29–30, *infra*.

STATEMENT

A. THE BOARD PROCEEDINGS

1. *The representation case.*—On July 9, 1962, the Insurance Workers Union, AFL–CIO ("the Union"), filled a representation petition with the Board pursuant to Section 9(c) of the Act, requesting certification as the bargaining representative of the debit insurance agents at Metropolitan Life Insurance Company's district office in Woonsocket, Rhode Island (R. 1a, 15a, n. 2). The Woonsocket office is in the Company's New England Territory, which encompasses Maine, Vermont, New Hampshire, Massachusetts, and Rhode Island. There are 75 district offices in this territory, employing 1,753 agents. The Company has 8 district offices (plus 2 detached offices which are under the administrative supervision of district offices) in the State of Rhode Island. The Rhode Island offices employ 219 agents, of whom the Woonsocket office employs 23. The nearest district office to Woonsocket is in Pawtucket, 12 miles away (R. 176a–178a).

At the hearing, the Company took the position that the unit sought by the Union was inappropriate, and that only the following could constitute an appropriate unit: (1) all the Company's offices in the United States; (2) all its offices in the New England Territory; or (3) all its offices in the State of Rhode Island (R. 15a, 31a–32a). The parties stipulated that the record in a prior representation case (Case No. 4–RC–4865 involving the Company's offices in

Wilmington, Delaware,' be incorporated by reference into the record in this case, with certain modifications (R. 27a, 175a–183a). The record thus incorporated reveals the following concerning the Company's general operations:

The Company, a New York corporation with its "home office" in New York City, is engaged in the sale and issuance of insurance policies throughout the United States and Canada (R. 30a, 38a). It maintains numerous district offices, and, for administrative purposes, it has divided its offices in the United States into 14 territorial divisions (R. 39a–40a, 46a–47a). Each division is headed by a "superintendent of agencies" who reports directly to a vice-president (R. 40a). The Company's operations are highly centralized and all matters of general business policy—relating to the terms and conditions of various policies as well as to the management of the district offices and supervision of agents—are determined at the New York home office (R. 38a–39a, 49a, 53a). The superintendents of agencies, who operate out of the home office, are responsible for implementation of Company policies and procedures in their particular territories

[1] In that case, the Board found that the Company's two district offices in the Wilmington metropolitan area constituted an appropriate unit and directed an election in that unit. *Metropolitan Life Insurance Co.*, 138 NLRB 565. The Union won the election in the *Wilmington* case, and the Board's subsequent order requiring the Company to bargain with the union was enforced by the Third Circuit. *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 328 F. 2d 820, pending on petition for a writ of certiorari, No. 56, this Term.

(R. 39a–49a). In the course of their duties they make periodic visits to many of the offices in their areas (R. 122a–123a, 39a, 42a).

Each district office is operated under the supervision of a manager who is directly responsible to the superintendent of agencies of his territory (R. 47a). The manager is, in the words of A. Rogers Maynard, second vice-president, the "chief executive of his particular district" (R. 164a). He is the "principal line officer in the district" and has immediate supervisory authority over the agents in the office (R. 165–166a, 47a–49a, 64a, 105a–107a). A percentage of the manager's compensation depends upon the volume of business done by his office as a whole; the remainder of his compensation is based on a fixed salary and commissions on policies he himself sells (R. 103a–105a).

While a manager does not have authority formally to hire agents for his district, he normally solicits applications for openings as they arise and then conducts a personal interview and orders retail credit and medical reports on the applicant (R. 54a–55a, 97a–100a, 158a–168a). If the manager decides that the applicant is likely to become a satisfactory agent, he forwards his recommendation and the individual's application to the superintendent of agencies for final decision; the manager's recommendation is followed approximately 75 percent of the time (R. 54a–55a, 97a–100a). After undergoing initial training for a period of two weeks in New York, the new agent receives additional training under the guidance and

direction of the assistant manager and manager in his district (R. 55a–56a, 65a–66a, 98a).

Although the agent spends the greater part of his time selling insurance in his assigned territory, he is required to report to the district office twice a week[2] and whenever else the manager directs (R. 51a–53a, 65a–66a, 85a–87a). A regular review is made of the agent's performance by the manager,[3] who, although he cannot discharge the agent, can recommend the latter's discharge to the superintendent of agencies and may accept an agent's resignation (R. 57a–59a, 63a–65a, 128a). In addition, the manager may order an audit of an agent's accounts whenever he believes it necessary; if there is a deficiency of $75 or more, the manager is required to suspend the agent until further notice (R. 64a–65a, 130a–131a).

All labor relations policies are established at the home office, and all agents are subject to the same wage policies, employee benefits, and working conditions. There is virtually no interchange or transfer of agents among the various district offices, and there

[2] At these times the agent attends regular meetings conducted by the manager to explain the latest Company directives, and he deposits premiums, turns in applications for policies, and picks up mail and other communications (R. 63a–65a).

[3] The manager is authorized to discuss "all matters pertaining to the general performance of their [the agents'] work, particularly with respect to the quality and quantity of insurance canvassed for and procured, the general accuracy with which they keep their books, records, and accounts, the diligence with which they conserve the Company's business, and assist holders of policies of the Company in realizing the benefits provided by their policies" (R. 63a–65a).

is no business or social contact among agents except on the level of the individual district office. All bidding for open agencies is limited to the agents of the particular district office where the opening occurs (R. 66a–68a).

Upon these facts, the Board concluded in the *Wilmington* case that "the individual district office is in effect a separate administrative entity through which the Employer conducts its business operations, and therefore is inherently appropriate for purposes of collective bargaining." 138 NLRB at 567. It pointed out that, although a single district office was an appropriate unit, that did "not preclude the grouping of such offices where such grouping is justified by cogent geographic considerations." *Ibid.* Accordingly, in that case, the Board grouped the Company's two district offices in the Wilmington metropolitan area into one unit, but excluded the Company's other district office in Delaware, located at Dover, 46 miles from Wilmington. *Id.* at 566–567.

Applying these principles in the instant case, the Board held that the employees located at the Woonsocket district office constituted an appropriate bargaining unit. The Board noted further that the nearest district office to Woonsocket was in Pawtucket, 12 miles away, that there was no recent history of collective bargaining, and that no union was seeking to represent the same employees as part of a larger unit (R. 15a, n. 2, 188a). The Board therefore directed an election among the debit insurance agents at the Company's Woonsocket district office, to determine

whether they desired the Union to represent them (R. 15a–16a).

The Union won the ensuing election and was certified by the Board as the bargaining representative (R. 8a).

2. *The unfair labor practice case.*—Following certification, the Union wrote to the Company on December 4, 1962, requesting that it bargain with the Union as representative of the employees in the Woonsocket office. On December 11, 1962, the Company answered that it would not recognize and bargain with the Union because the Board's unit determination was erroneous (R. 8a). The Union thereupon filed unfair labor practice charges with the Board. The Board, adhering to its prior unit determination, held that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union (R. 4a, 9a). The Board directed the Company to cease and desist from its unfair labor practices, to bargain with the Union upon request, and to post appropriate notices (R. 5a, 9a–10a).

B. THE COURT OF APPEALS' DECISION

The court of appeals declined to enforce the Board's order. In its view the Board, in finding that the Woonsocket district office was an appropriate unit, was controlled by the extent of the Union's organization, contrary to Section 9(c)(5) (R. 5–12).

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that the Board had violated Section 9(c)(5) by directing an election among the debit insurance agents at respond-

ent's Woonsocket office. Section 9(c)(5), which was added to the Act in 1947, does not prohibit the Board from considering the extent of organization as one factor bearing upon the appropriateness of any particular unit. It forbids only such unit determinations as are "controlled" by the extent of organization. In the present case, the Board based its decision on factors other than extent of organization, and those factors are applicable in all insurance cases involving determinations of appropriate bargaining units for agents.

It is elementary that there may be more than one way in which the employees of a given employer appropriately may be grouped for purposes of collective bargaining. Since the individual district office of an insurance company is a distinct administrative unit analogous to the plant unit of a multi-plant industrial concern, the Board has concluded that it constitutes an appropriate unit and that it will be certified unless there are other factors, consistent with traditional unit criteria, which justify joining two or more district offices in a single unit. A unit composed of two or more district offices is also an appropriate unit where there is a reasonable degree of geographical coherence among the offices. In cases where either the district office or a combination of offices might be found appropriate on the basis of factors other than the extent of organization, the Board takes the union's request into account in deciding which unit to certify. Section 9(c)(5) does not preclude the Board from taking the union's request into account in such cir-

cumstances. And the recent decisions in which separate offices were combined are consistent with the determination in this case since in those instances geographical and other criteria warranted joining two or more offices in the single unit.

ARGUMENT

THE BOARD'S FINDING THAT A SINGLE DISTRICT OFFICE CONSTITUTED AN APPROPRIATE BARGAINING UNIT DID NOT VIOLATE SECTION 9(C)(5) OF THE ACT

In this case the Court of Appeals for the First Circuit has overturned the Board's determination regarding the appropriateness of a bargaining unit on the ground that the Board's conclusion amounted to "an evasion by the Board of the command laid upon it by § 9(c)(5), * * *" because it was based on a reversion to the earlier prohibited Board policy "of regarding the extent of union organization as controlling * * *" (R. 9, 12). We submit that Section 9(c)(5) permits the Board to consider the extent of union organization as one factor among many bearing upon the appropriateness of a bargaining unit; that the Board's finding in this case was supported by criteria other than the extent of union organization; and that the Board's determination was consistent with the course of decisions on this subject subsequent to the enactment of Section 9(c)(5).

A. THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 9(C)(5) DEMONSTRATE THAT THE EXTENT OF ORGANIZATION MAY BE CONSIDERED BY THE BOARD SO LONG AS IT IS NOT GIVEN CONTROLLING WEIGHT

Section 9(b) of the National Labor Relations Act (p. 30, *infra*) provides:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

The broad delegation of authority contained in the above provision was limited in 1947 by the enactment of Section 9(c)(5) (p. 30, *infra*), which reads as follows:

> In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

The terms of this limitation do not prohibit the Board from looking to the extent of employee organization as one factor in a unit determination; they merely direct that this single element not be given "controlling" weight. This reading of Section 9(c)(5) is confirmed by the legislative history of the amendment and by the prior course of Board decisions which the amendment was intended to over-

rule. Before the enactment of Section 9(c)(5), it was the Board's policy to direct elections even in units which satisfied no criterion other than that they represented the extent of the union's completed organizational activities. This policy was followed in order "to render collective bargaining an immediate possibility" among the employees in the requested unit (*Armour & Company,* 63 NLRB 1214, 1216–1217), "without requiring them to await organization on a broader basis at an uncertain date in the future" (*Carson Pirie Scott & Co.,* 63 NLRB 1096, 1099).[4] It was this practice of giving controlling weight to the extent of the union's organization that prompted the enactment of Section 9(c)(5).

The limiting provision first appeared in the House Bill as Section 9(f)(3). The report of the House Labor Committee explained (H. Rep. No. 245, 80th Cong., 1st Sess., 37–38, 1 Leg. Hist. 328–329):[5]

> Section 9(f)(3) strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for

[4] See also *New England Spun Silk Corp.*, 11 NLRB 852, 855; *Botany Worsted Mills*, 27 NLRB 687, 690; *Pacific Gas & Electric Co.*, 44 NLRB 665, 671; *Western Automatic Machine Screw Co.*, 51 NLRB 1042; *Globe Brick Co.*, 65 NLRB 527, 529–530; Twelfth Annual Report of the National Labor Relations Board (G.P.O., 1948), p. 20.

[5] "Leg. Hist." denotes the two-volume legislative history of the Labor Management Relations Act, 1947 (G.P.O., 1948).

> holding such units to be appropriate * * *. *While the Board may take into consideration the extent to which employees have organized,* this evidence should have little weight, and, as section 9(f)(3) provides, is not to be controlling. * * *
>
> The act still leaves the new Board wide discretion in setting up bargaining units. [Emphasis added.]

The Senate Bill did not contain a similar limitation, but the Conference Committee adopted the House provision (renumbering it 9(c)(5)). H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 48, 1 Leg. Hist. 552. Senator Taft, explaining the action of the Conference Committee, stated (93 Cong. Rec. 6860, 2 Leg. Hist. 1625):

> Section 9(c)(5). This amendment was contained in the House Bill. It overrules the "extent of organization" theory sometimes used by the Board in determining appropriate units. Opponents of the bill have stated that it prevents the establishment of small operational units and effectively prevents organization of public utilities insurance companies and other businesses whose operations are widespread. It is sufficient answer to say that the Board has evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographical considerations, etc., any one of which may justify the finding of a small unit. *The-extent-of-organization theory has been used where all valid tests fail to give the union what it desires* and represents a surrender by the Board of its duty

> to determine appropriate units. * * * [Emphasis added.]

Senator Taft added (93 Cong. Rec. 6444, 2 Leg. Hist. 1542):

> Subsection 9(c)(5) adopts the House amendment written to discourage the Board from finding a bargaining unit to be appropriate even though such unit was only a fragment of what would ordinarily be deemed appropriate, simply on the extent of organization theory.

In sum, both the language and the legislative history of Section 9(c)(5) demonstrate that that provision was merely intended to preclude the Board from basing its unit determination solely on the extent of organization in the absence of other criteria of appropriateness.[6] The provision was not intended to prohibit the Board from considering extent of organization as one factor in its determination, or to invalidate units which qualified under the other established tests for appropriateness irrespective of extent of organization. See *National Labor Relations*

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[6] Accordingly, following the enactment of Section 9(c)(5), the Board dismissed representation petitions where the units sought could be supported only on the basis of extent of organization. See *Pomeroy's, Inc.*, 76 NLRB 633, 635; Mandel *Bros.*, 77 NLRB 512, 513; *Westbrook Enterprises, Inc.*, 79 NLRB 1032, 1033; *Dun & Bradstreet, Inc.*, 80 NLRB 56, 60; *C. Pappas Co.*, 80 NLRB 1272, 1273; *Thalhimer Bros., Inc.*, 81 NLRB 1175, 1176; *Westclox*, 82 NLRB 198, 199; *Sinclair Refining Co.*, 89 NLRB 969, 970; *Montgomery Ward & Co.*, 90 NLRB 609, 611; *Pacific Laundry Co.*, 99 NLRB 1011, 1022; *Murray Corp.*, 101 NLRB 313, 315; *J. L. Hudson Co.*, 103 NLRB 1378, 1386; *Hercules Powder Co.*, 104 NLRB 259, 261; *Sanitary Farms Dairies, Inc.*, 107 NLRB 955, 956–957; *E. I. DuPont & Co.*, 111 NLRB 649, 653.

Board v. *Salant*, 171 F. 2d 292, 293 (C.A. 6); *Union Carbide and Carbon Corp.* v. *National Labor Relations Board*, 244 F. 2d 672, 673 (C.A. 6); *General Instrument Corp.* v. *National Labor Relations Board*, 319 F. 2d 420, 423 (C.A. 4), certiorari denied, 375 U.S. 966; *Westinghouse Electric Corp.* v. *National Labor Relations Board*, 236 F. 2d 939, 943 (C.A. 3); *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 406 (C.A. 9), certiorari denied, 348 U.S. 887; *National Labor Relations Board* v. *Smythe*, 212 F. 2d 664, 667–668 (C.A. 5); *Texas Pipe Line Co.* v. *National Labor Relations Board*, 296 F. 2d 208 (C.A. 5); *National Labor Relations Board* v. *Morganton Full Fashioned Hosiery Co.*, 241 F. 2d 913, 915–916 (C.A. 4).

B. THE BOARD'S CONCLUSION IN THIS CASE WAS BASED ON FACTORS OTHER THAN THE EXTENT OF EMPLOYEE ORGANIZATION

Contrary to the view of the court of appeals, the Board in this case, as in its earlier decisions (pp. 24–27, *infra*), has followed a course entirely consistent with the command of Section 9(c)(5). There may be more than one way in which employees of a given employer may be grouped for purposes of collective bargaining under the various permissible criteria for determining the bargaining unit.[7] This is as

[7] *E.g.*, *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 328 F. 2d 820, 325 (C.A. 3), petition for certiorari pending, No. 56, this Term; *National Labor Relations Board* v. *Quaker City Life Insurance Co.*, 319 F. 2d 690, 693 (C.A. 4); *Mueller Brass Co.* v. *National Labor Relations Board*, 180 F. 2d 402, 405 (C.A.D.C.), and cases there cited.

true in the insurance business as in any other industry. The appropriateness of any particular bargaining unit depends, in turn, on an evaluation of the peculiar characteristics of the industry in question and of the employer and employees involved.

In determining what is the appropriate unit in a particular case, the Board, with court approval, has customarily looked to such factors as the community of interest among the employees sought to be represented; whether they comprise a homogeneous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision; the previous history of bargaining; and the geographic proximity of various parts of the employer's operation.[8] Where, under these criteria, more than one unit might be found to be appropriate, it is the Board's function to select from among the possible alternatives; its choice is not to be disturbed if it is reasonable.[9]

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[8] *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 380; *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 406 (C.A. 9), certiorari denied, 348 U.S. 887; *Harris Langenberg Hat Co.* v. *National Labor Relations Board*, 216 F. 2d 146 (C.A. 8); *Texas Pipe Line Co.* v. *National Labor Relations Board*, 296 F. 2d 208, 212–213 (C.A. 5); *National Labor Relations Board* v *West Kentucky Coal Co.*, 152 F. 2d 198, 202 (C.A. 6); *National Labor Relations Board* v. *Smith*, 209 F. 2d 905 (C.A. 9); Twenty-eighth Annual Report of the National Labor Relations Board (G.P.O., 1964), pp. 50–53.

[9] See *General Instrument Corp.* v. *National Labor Relations Board*, 319 F. 2d 420, 422–423 (C.A. 4), certiorari denied, 375 U.S. 966; *Mountain States Telephone and Telegraph Co.* v. *National Labor Relations Board*, 310 F. 2d 478, 480 (C.A.

The uncontradicted evidence in the present case demonstrates that each of the Company's district offices, including the Woonsocket, Rhode Island, office, operates as a distinct entity in the Company's operations. As Vice-President Maynard admitted, "an alternative course of action * * * would be a less satisfactory business procedural arrangement * * * to the policyholders themselves and less efficient from the standpoint of the operation of the business" (R. 78a). For, according to Maynard, the district office subdivision exists "[i]n order to carry on the business of the Company, efficiently and effectively to provide local service to the policyholders of the Company in the area where the District Office is located" (*ibid.*). In short, the district office is the "grass roots" field office of the Company, linking the policyholders in various parts of the country with the distant home office in New York. Moreover, each office operates within a defined geographic area, and is, to a significant degree, a self-contained unit, autonomous in its day-to-day functioning. The district manager in each office exercises immediate control and supervision over the agents in his office. The agents in each office enjoy common working conditions and benefits, and provide service only to clients within their designated territories. Almost no transfer or interchange of employees takes place among the offices. Finally, while the superintendent of agencies,

10); *National Labor Relations Board* v. *Smythe*, 212 F. 2d 664, 667–668 (C.A. 5); *Harris Langenberg Hat Co. v. National Labor Relations Board*, 216 F. 2d 146, 148 (C.A. 8); *Mueller Brass Co.* v. *National Labor Relations Board*, 180 F. 2d 402, 405 (C.A.D.C.).

with his office in New York, oversees the district offices within each territory, the district manager is the principal representative of Company authority and policy so far as individual agents are concerned. It is the district manager who transmits and explains Company policy to the agents during the periodic group meetings and individual conferences, and it is the manager who reviews each agent's performance with him (pp. 5–6, *supra*).[10]

In these circumstances, the Board was warranted in concluding that "each of the [Company's] individual district offices was in effect a separate administrative entity through which the Employer conducted its business operations, and therefore was inherently appropriate for purposes of collective bargaining" (R. 15a, n. 2). Moreover, since the nearest district office to Woonsocket was 12 miles away and since "there is no recent history of collective bargaining, no union seeking a larger unit, and the district office sought is located in a separate and distinct geographical area" (*ibid.*), the Board was further warranted in concluding that the insurance agents located at the Company's Woonsocket district office constituted an appropriate unit for purposes of collective bargaining.

Since the plant is the basic component of a manufacturing enterprise and Section 9(b) of the Act specifically recognizes the validity of such a unit, the Board has long held that a unit confined to a single plant of a particular employer is presumptively an

[10] See also note 16, *infra*, p. 24.

appropriate unit.[11] The district office is the insurance industry's analogue of the single manufacturing plant. For this reason the Board's basic position with regard to bargaining units among agents in the insurance industry has been that each individual district office, which constitutes a separate administrative unit analogous to the plant unit of a multi-plant industrial concern, is an appropriate separate bargaining entity and will, therefore, be the unit in which an election will be directed if requested.

A unit composed of two or more district offices is also an appropriate unit if there is a reasonable degree of geographic coherence among the offices. If the offices are not too distant and their territories are either adjacent or in reasonable proximity to one another, then, in the absence of strong countervailing considerations, conventional and well-accepted criteria would make a combination appropriate. In such cases—where either the district office or a combination of offices might be found "appropriate" on the basis of factors other than the extent of organization—the Board takes the union's request into account in deciding which to certify. There is little sense in putting adjacent offices, organized by the same union, in different bargaining units where a combination would be equally appropriate. Moreover, although other rational groupings of offices may be possible, there is no reason to compel a labor organization to seek rep-

[11] See, *e.g.*, *Beaumont Forging Co.*, 110 NLRB 2200, 2201-2202; *Fredrickson Motor Express Corp.*, 121 NLRB 32, 33; *Hygrade Food Products Corp.*, 85 NLRB 841, 848 (concurring opinion).

resentation in a larger unit than the one requested unless that unit is itself inappropriate.[12] Nor is the Board "controlled" by the extent of organization in thus giving weight to the union's request. Section 9(c)(5) does not preclude the Board from taking that factor into account in selecting among two or more units, any of which would be appropriate under traditional criteria apart from extent of organization.

The Board has recently summarized its standards with respect to unit determination in the insurance industry in *Metropolitan-Meriden and New London*, 147 NLRB No. 8 (reprinted as Appendix B, pp. 31–39, *infra*), in which it found appropriate separate bargaining units consisting of single district offices in Meriden and New London, Connecticut. The Board reaffirmed its earlier finding that, since each district office is a separate administrative entity through which the Company conducts its business operations, it, by itself, constitutes an appropriate unit for purposes of collective bargaining. However, the Board added (pp. 36–37, *infra*):

> This is not to say, of course, that a number of units larger than those here found appropriate would not also be appropriate. To the contrary, we have found that various groupings of district offices, if based on cogent geographic considerations, are appropriate for the purposes of collective bargaining and have directed elections in such units where the union has so re-

[12] See *Dixie Belle Mills, Inc.*, 139 NLRB 629, 631; *P. Ballantine & Sons*, 141 NLRB 1103, 1107; cf. *Ny-Lint Tool & Mfg. Co.* 77 NLRB 642.

> quested. Moreover, it is clear that, when we give effect to the union's request in determining which one of several overlapping appropriate units of different sizes should be certified, we are not allowing ourselves to be controlled by the extent of the union's organization, in violation of Section 9(c)(5) of the Act. For that section prohibits only the establishment of a bargaining unit which would not be appropriate when judged by traditional criteria. Since either a single district office or a grouping of such offices where they are geographically related would be appropriate under traditional criteria, to grant the union's request for one or the other of these otherwise appropriate units does not violate Section 9(c)(5). [Footnotes omitted.]

Since the Board's decision in this case was based on the application of the above criteria, it cannot be said to have been "controlled" by the extent of organization—even though one of the Board's expressed bases of decision was that there was "no union seeking a larger unit." Nor was Section 9(c)(5) violated because the Union, in petitioning for this particular unit, may have been motivated by the extent of organization. As the Third Circuit stated in *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 328 F. 2d 820, 826, petition for certiorari pending, No. 56, this Term (the *Wilmington* case):

> Whether the employees were controlled by the extent of their organization when they petitioned the Board is not the issue. Rather, it is whether the Board in determining a unit's appropriateness was so controlled.

And, as the Sixth Circuit added in *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 330 F. 2d 62, 65, petition for certiorari pending, No. 229, this Term (the *Cleveland* case):

> A unit as determined by the Board may be co-extensive with union organization but the Act is not violated unless extent of organization is the controlling motive of the Board in making its determination. * * *

C. THE BOARD'S DECISION WAS CONSISTENT WITH ITS RECENT PRECEDENTS

In 1944, the Board announced a policy regarding bargaining units for insurance agents which departed from the flexible approach utilized with respect to other industries. In *Metropolitan Life Insurance Co.*, 56 NLRB 1635, the Board ruled that it would not establish units of insurance agents less than state-wide or company-wide in scope. Its reasons were as follows (56 NLRB at 1639–1640):

> Organization among insurance agents is comparatively recent, but is steadily growing. The tendency of such organization is toward State-wide units. * * * Thus, the rapid growth of union organization among insurance agents makes it clearly appear that provisional units less than State-wide in scope are, under ordinary circumstances, unnecessary to make collective bargaining reasonably possible for them if they desire it. Accordingly, we are of the opinion that, in the absence of unusual circumstances, the practice of setting up units for insurance agents smaller than State-wide in scope should be avoided. In the instant case,

> since the Federation, the Independent, and the C.I.O. are actively engaged in a broad organizational program in Ohio, and since it may reasonably be anticipated that one of these organizations may in the near future extend its membership to State-wide proportions, we are of the opinion that it will not effectuate the policies of the Act to set up city-wide units for employees of the Company in Ohio at this time * * *.

For more than seventeen years, the Board adhered to this policy, finding state-wide units of insurance agents appropriate for bargaining purposes,[13] and dismissing representation petitions filed by unions seeking to represent insurance agents in city-wide or district-wide units.[14] The rule was limited to insurance agents, however, and was not applied to other segments of the insurance industry.[15]

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[13] See, *e.g.*, *Monumental Life Insurance Co.*, 60 NLRB 510, 512; *John Hancock Life Ins. Co.*, 62 NLRB 240, 245–247; *Western and Southern Life Insurance Co.*, 65 NLRB 855, 856–858; *American National Insurance Co.*, 69 NLRB 745, 746–747; *Home Beneficial Life Insurance Co.*, 98 NLRB 1053, 1054; *United Insurance Company*, 108 NLRB 843, 848.

[14] See, *e.g.*, *Peoples Life Insurance Co.*, 72 NLRB 1406, 1408–1409; *Quaker City Life Insurance Co.*, 73 NLRB 177, 179–180; *Home Beneficial Life Insurance Co., Inc.*, 89 NLRB 392, 393–394.

[15] See, *e.g.*, *The Travelers Insurance Co.*, 116 NLRB 387, where the Board found appropriate a bargaining unit of insurance adjusters limited to the employer's branch office in Boston. Moreover, where the employer and union agreed to a district-wide bargaining unit of insurance agents, the Board found such unit appropriate. See *The Baltimore Life Insurance Co.*, 73 NLRB 848, 849–850.

In 1961, in *Quaker City Life Insurance Co.*, 134 NLRB 960, the Board reversed the *Metropolitan Life* rule. The Board pointed out that the *Metropolitan Life* rule had been adopted *solely* in anticipation of broader organization among insurance agents on a company-wide or state-wide basis. It concluded (134 NLRB at 962):

> As a practical matter, however, such statewide or companywide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance agents to an extent certainly never contemplated by the Act, or for that matter, by the Board that decided the *Metropolitan Life* case. There is no longer any rational basis for applying different rules of organization to the insurance industry than are applied to other industries * * *. Accordingly, in the future, the Board's policy will be not to preclude the organization of insurance agents into units of less than employerwide or statewide scope, and we shall apply our normal unit principles to the cases as they arise.

Thus, in *Quaker City* itself, the Board, finding that the district office was a distinct administrative division of the insurance company,[16] concluded that the insurance agents in a single district office constituted an appropriate bargaining unit, and directed an elec-

[16] The Board emphasized the "day-to-day operation of the district office * * *, the overall immediate supervision by the district manager, the lack of contact or interchange among employees of the various district offices, and the absence of any administrative subdivision between the home office and the district office * * *." 134 NLRB at 962.

tion in that unit.[17] Applying the *Quaker City* policy, the Board has found a single district office to be an appropriate unit in the instant case (R. 14a), and in *Western and Southern Life Insurance Co.*, 138 NLRB 538.[18] It has also found, under that policy, that units consisting of several district offices are appropriate where the union requests them and they comprise a separate and distinct geographic area. *Metropolitan Life Insurance Co.—Wilmington*, 138 NLRB 565 (two district offices in Wilmington, Delaware); *Metropolitan Life Insurance Co.—Cleveland*, 138 NLRB 512 (six district offices in Cleveland, Ohio, and three suburban offices); *Metropolitan Life Insurance Co.—Chicago*, 144 NLRB 149 (all of the 33 district offices in Chicago); *Metropolitan Life Insurance Co.—Detroit*, 146 NLRB No. 184 (seven district offices in the Greater Detroit area, together with detached of-

[17] The Board's decision in *Quaker City* was sustained by the Fourth Circuit, *National Labor Relations Board* v. *Quaker City Life Insurance Co.*, 319 F. 2d 690.

[18] Similarly, in *Metropolitan Life Insurance Co.—Meriden and New London*, 147 NLRB No. 6, the Board found appropriate a single district office in Meriden, Connecticut, and a single district office in New London, Connecticut (the latter together with its detached office at Westerly, Rhode Island); and in *Metropolitan Life Insurance Co.—Sioux City*, 138 NLRB 734, it found appropriate a single district office in Sioux City, Iowa, together with its detached offices in Fargo, North Dakota and Sioux Falls, South Dakota. A detached office is administered as part of the district office (see 138 NLRB at 736). And see *Metropolitan Life Insurance Co.—Holyoke*, 147 NLRB No. 84 (single district office in Holyoke, Massachusetts); *Metropolitan Life Insurance Co.—Chicago Heights*, 148 NLRB No. 145 (single district office in Chicago Heights, Illinois).

fices); *Metropolitan Life Insurance Co.—Toledo,* 146 NLRB No. 113 (district offices in Toledo, Ohio area, together with detached offices); *Equitable Life Insurance Co.,* 138 NLRB 529 (two district offices in Cleveland and a detached office in Lorain, Ohio).

The court of appeals based its conclusion that the Board had violated Section 9(c)(5) in this case on its assumption that it was impossible to reconcile the post-*Quaker City* decisions on the basis of geographical criteria (R. 10–11). Hence it reasoned that, since the Board had consistently determined in these cases that the unit requested by the union was the appropriate one and since the Union here had requested the district-office unit only after it had unsuccessfully attempted to organize on a broader basis (R. 11–12), the "controlling" factor must have been the extent of organization. We submit, however, that the post-*Quaker City* cases are entirely consistent with the standards applied here—which are discussed at pp. 16–21, *supra*—and do not turn on the extent of organization.

The instances in which a single district office was deemed to be an appropriate unit (*i.e., Western and Southern Life Insurance Co., supra,* and see cases cited at note 18, *supra*) are obviously consistent with the present decision. And, in each of the instances in which two or more district offices were combined, criteria other than extent of organization justified the Board's finding. In *Equitable Life, supra,* the unit consisted of the company's only two offices in Cleveland (together with a detached office in Lorain, Ohio,

which was not a separate entity). The *Metropolitan-Wilmington* ruling combined the two offices in the city; the only other office in the State was 46 miles away, in another city. The unit in *Metropolitan-Toledo* combined all the offices in the city, and the *Metropolitan-Detroit* unit combined all the offices in the Greater Detroit area. Nor is this analysis impaired by the fact that in *Metropolitan-Chicago,* the Board joined all 33 offices within the city limits but excluded the 14 suburban offices, while in *Metropolitan-Cleveland,* it combined all 6 offices within the city with the 3 offices in the suburbs. In the *Cleveland* case, the suburban offices were much closer to the center of the city than many of the suburban offices excluded in the *Chicago* case; there was thus a rational basis for the different groups.[19] Although a unit composed of all the offices in the Chicago area might also have been appropriate, the Board's failure to adopt it does not establish the inappropriateness of the smaller unit.

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[19] In the *Cleveland* case, the three suburban offices included were situated 8 or 9 miles from the center of the city. 138 NLRB at 514. In the *Chicago* case, to include all of the offices in the Chicago metropolitan area would have required including district offices as far away as 39 miles from the center of the city. In contrast, the unit chosen, consisting of the 33 district offices within the political limits of the city and excluding the 14 suburban offices, produced a relatively compact grouping, with all offices within 14 miles of the center of the city. See Company Exhibit 3A–3B in *Metropolitan-Chicago,* 144 NLRB 149.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded with directions to enforce the Board's order in full.

Respectfully submitted.

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DECEMBER 1964.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * *

(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * * * *

APPENDIX B

Case No. 1–CA–4367

United States of America
Before the National Labor Relations Board

METROPOLITAN LIFE INSURANCE COMPANY

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL–CIO

Decision and Order

On January 23, 1964, Trial Examiner William F. Scharnikow issued his Decision in the above-entitled proceeding, finding that Respondent Metropolitan Life Insurance Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions, as set forth in the Decision attached hereto. Thereafter, the Respondent filed exceptions to the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Decision and the entire record in the case, including the Respondent's exceptions, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

In finding that Respondent violated Section 8(a) (5) and (1) of the Act, we note the recent decision of the United States Court of Appeals for the First Cir-

cuit in *Metropolitan Life Insurance Co.* v. *N.L.R.B.*, 327 F. 2d 906 (C.A. 1). In that case, the court stated that it was "handicapped * * * by the Board's failure to articulate specific reasons for its unit determination" (327 F. 2d at 909), and concluded that in finding appropriate a unit limited to the insurance agents working in a single district office the Board had been controlled by the extent of the union's organization, contrary to the mandate of Section 9(c)(5) of the Act. With all due deference to the Court of Appeals for the First Circuit, we believe that our representation decision in that case articulated the reasons supporting our unit finding; the decision itself was not controlled by the extent of the union's organization. We note also that the First Circuit's decision conflicts with an earlier decision of the Fourth Circuit (*N.L.R.B.* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690), and also with subsequent decisions of the Third and Sixth Circuits in cases virtually identical with that before the First Circuit (*Metropolitan Life Insurance Co.* v. *N.L.R.B.*, 328 F. 2d 820 (C.A. 3) 1964; *Metropolitan Life Insurance Co.* v. *N.L.R.B.*, F. 2d (C.A. 6), decided April 11, 1964). However, in the event that the reasoning underlying our representation decisions herein may have been misunderstood, we shall again spell out the factors and considerations which led us to conclude that units limited to (a) the district office in New London, Connecticut (together with the detached office at Westerly, Rhode Island), and (b) the district office at Meriden, Connecticut, constitute separate units appropriate for the purpose of collective bargaining.

In the representation proceeding,[1] the Respondent

[1] The instant case involves two separate units, arising out of two separate petitions which were consolidated for the purpose of hearing and later severed for the purpose of decision.

and the Union stipulated that the facts with respect to the geographic scope of the unit were identical to those established in a prior proceeding involving the same parties, *Metropolitan Life Insurance Co.*, 138 NLRB 565.[2] The Respondent's operations as set forth therein are as follows:

The Company is engaged in the sale and issuance of various types of insurance policies and does business throughout the United States and Canada. It maintains its principal office in New York, New York, and, for administrative purposes, it has divided its offices throughout the United States into 14 territorial divisions. Each such division is headed by a superintendent of agencies who reports directly to a Company vice president. The district offices sought to be represented here by the Union are included in Respondent's Eastern territory, which encompasses Connecticut and most of New York State.[3] The unit sought to be represented by the Union in Case No. 1–RC–7331 would include the Company district office in New London, Connecticut, and any offices administratively detached, here the Westerly, Rhode Island, office. The unit sought in Case No. 1–RC–7313 includes the Company's district office in Meriden, Connecticut.[4]

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[2] This is the representation decision which was upheld by the Third Circuit in its *Metropolitan* decision, *supra*, 328 F. 2d 820.

[3] Although the detached office here involved is located in Westerly, Rhode Island, in the Company's New England territory, it is under the administrative control of the New London, Connecticut, district office, from which it is detached. For the purposes of this Decision, we shall consider the Westerly office as an extension of the New London district office. See *Metropolitan Life Insurance Co.*, 138 NLRB 734, 736.

[4] There are no offices detached from the Meriden district office.

The Company's business operations are highly centralized, and policies and procedures are established at the home office which governs the management of the district office and the duties and functions of the agents. The superintendent of agencies, whose office is located in New York, has the responsibility for seeing that the offices in his territory operate in accordance with these Company directions, and in the course of his duties, the superintendent of agencies makes periodic visits to the offices in his territory.

Each district office has a manager in charge, who is the immediate supervisory authority over the agents in the office. Agents are required by Company regulations to perform all of their work through and subject to the general supervision and direction of the manager of the district office to which they are assigned. The manager normally solicits applications for openings in his district, and, although he does not have the authority to hire an individual applicant, he may recommend that such action be taken. In carrying out his function as a recruiter, the manager accepts the prospective agent's application, conducts a personal interview, and orders a retail credit and medical report. The application, together with the manager's recommendation, is then forwarded to the superintendent of agencies in New York who makes the final determination. New agents receive their initial training in New York and are then assigned to a district office where they receive additional training under the guidance and direction of the manager and assistant manager. Although the agent spends the greater part of his time in his assigned territory selling industrial and other types of insurance, he is required to report to the district office twice a week and whenever the manager so directs. One day each week is devoted to a general meeting, at which the manager

explains to his agents the latest company directives. The manager regularly reviews the agents' performance and although he has no authority to terminate an agent's appointment, the manager may accept the agent's resignation, if tendered, or he may recommend to the superintendent of agencies that the agent be terminated. The manager may order an audit of the agent's accounts whenever he feels it is necessary and, in the event of a deficiency of $75 or more in the agent's accounts, the manager is required to suspend him until further notice.

All labor relations policies are established at the home office and all agents are subject to the same wage policies, employee benefits, and working conditions. All bidding on job openings is limited to the agents of the particular district office where the opening occurs. There is virtually no interchange or transfer of agents among the various district offices and there is no business or social contact among agents except on the individual district office level. There is no history of collective bargaining affecting the employees involved in the instant proceeding.

These facts demonstrate that each district office is a separate administrative entity through which the Company conducts its business operations. Thus, the district office is a distinctive administrative subdivision created by the Company for the purpose of carrying on its business in the most efficient manner; each office operates in many respects as a complete, self-contained, and autonomous unit; there is separate immediate control and supervision by the district manager in each office; there is virtually no transfer or interchange of employees among offices; and the agents within each office enjoy common working conditions. As the individual district office is thus appropriate, and as no labor organization is seeking a

broader unit, we reaffirm our findings below that the New London and Meriden district offices constitute separate units appropriate for the purposes of collective bargaining. *N.L.R.B.* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690 (C.A. 4); *Metropolitan Life Insurance Company* v. *N.L.R.B.*, 328 F. 2d 820 (C.A. 3).

This is not to say, of course, that a number of units larger than those here found appropriate would not also be appropriate. To the contrary, we have found that various groupings of district offices, if based on cogent geographic considerations, are appropriate for the purposes of collective bargaining and have directed elections in such units where the union has so requested.[5] Moreover, it is clear, that, when we give effect to the union's request in determining which one of several overlapping appropriate units of different sizes should be certified, we are not allowing ourselves to be controlled by the extent of the union's organization, in violation of Section 9(c)(5) of the Act. For that section prohibits only the establishment of a bargaining unit which would not be appropriate when judged by traditional criteria.[6] Since either a single

[5] See the following *Metropolitan Life Insurance Co.* cases: 138 NLRB 565 (2 district offices in Wilmington, Delaware); 138 NLRB 512 (6 district offices in Cleveland, Ohio, and 3 suburban offices); 138 NLRB 734 (one district office in Sioux City, Iowa, and 2 detached offices); 144 NLRB No. 15 (33 district offices in Chicago, Illinois). And see *Equitable Life Ins. Co.*, 138 NLRB 529 (2 district offices in Cleveland and a detached office in Lorain, Ohio).

[6] The vice intended to be cured by Section 9(c)(5) was, in the words of Senator Taft, the use of extent of organization "where all valid tests fail to give the union what it desires." 93 Cong. Rec. 6860; 2 Legislative History of the LMRA, 1947 (G.P.O. 1948) 1625. It is settled law, however, that extent of organization may legitimately be a factor in a Board unit

district office or a grouping of such offices where they are geographically related would be appropriate under traditional criteria, to grant the union's request for one or the other of these otherwise appropriate units does not violate Section 9(c)(5).[1]

The units approved herein included a class of employees, known as Metropolitan Insurance Consultants (MIC's), who were not involved in the prior decisions. We note that in the representation hearing herein, the Regional Director, in including the MIC's relied upon the record of proceedings in an earlier case involving this respondent (*Metropolitan Life Insurance Co.*, Case No. 13–RC–9130), which record was also incorporated into the record of the proceedings herein by stipulation of the parties. The parties agreed that, with minor changes, the factual and legal issues regarding the MIC's were essentially similar to those in the earlier case. This record showed the MIC's are engaged principally in the sale of insurance in amounts exceeding $1,000. They sell personal accident and health insurance, business,

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determination, so long as it is not controlling. H. Rep. 245 on H.R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist, LMRA 328–329; *N.L.R.B.* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690, 693–694 (C.A. 4); *Metropolitan Life Ins. Co.* v. *N.L.R.B.*, 328 F. 2d 820, 826–827 (C.A. 3), Company petition for certiorari filed April 8, 1964 (No. 982, October Term 1963).

[1] We have often stated that it is our policy not to compel a labor organization to seek representation in a larger unit unless the unit requested is itself inappropriate. See *e.g.*, *Dixie Belle Mills, Inc.*, 139 NLRB 629, 631; *P. Ballantine & Sons*, 141 NLRB 1103, 1107. *Bagdad Copper Company*, 144 NLRB No. 141, p. 3; *Gordon Mills, Inc.*, 145 NLRB No. 78, pp. 4–5. For the reasons stated above, however, this is a far cry from our giving controlling weight to the extent of the union's organization.

group life insurance, pension plans, and estate planning coverage, whereas regular and office account agents are principally engaged in the sale of what is generally termed "industrial" insurance. Generally, the MIC's and other agents have the same supervision; wages and other fringe benefits are similar for both. Ninety-five percent of all MIC's were formerly employed as regular or office account agents. Based upon the line of progression from agent to MIC, the frequent contact between the two groups, and their similar supervision, the Regional Director found that a community of interest existed between the MIC's and the other agents included in the unit found appropriate. The Board agreed that the MIC's appropriately belonged in the unit. *Metropolitan Life Insurance Co.*, 146 NLRB No. 113, see *Metropolitan Life Insurance Co.*, 144 NLRB No. 15.

As the units involved herein are appropriate, we find, in agreement with the Trial Examiner, the Respondent's admitted refusal to bargain with the Union was violative of Section 8(a)(5) and (1) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order, the Order recommended by the Trial Examiner, and orders that the Respondent, Metropolitan Life Insurance Co., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the modifications set forth below:

1. The following paragraph 1(b) is added to the Recommended Order: "1(b) Interfering with the efforts of the Insurance Workers International Union, AFL–CIO, to negotiate for or represent the employees

in the said appropriate units as the exclusive bargaining agent."

2. The following is substituted for the first indented paragraphs beginning "WE WILL NOT refuse to * * *" in Appendices A and B attached to the Decision:

> WE WILL NOT interfere with the efforts of the INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, to negotiate for or represent as exclusive bargaining agent the employees in the bargaining unit described below.

Dated, Washington, D.C.

FRANK W. McCULLOCH,
Chairman,

JOHN H. FANNING,
Member,

GERALD A. BROWN,
Member,
National Labor Relations Board.

(SEAL)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 19

No. 98

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

METROPOLITAN LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

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INDEX

PAGE

Question Presented 1

Statement 2

Summary of Argument 11

ARGUMENT:

POINT I:

The court below correctly discerned that, in defining the bargaining unit, the Board had violated Section 9(c)(5) of the Act by treating as controlling the extent to which the employees had organized 15

1. Development of the 1944 Metropolitan Insurance Rule 16
2. The enactment of Section 9(c)(5) 18
3. Board policy from the enactment of Section 9(c)(5) until 1961 20
4. Reversal of Board policy in the Quaker City case 22
5. The true rationale of the Board majority in Quaker City 24
6. The basis for the refusal of the court below to enforce the Board's order 25

PAGE

POINT II:

The inconsistent application of the Board's new geographic coherence doctrine irrefutably proves that extent of organization controlled its decision here. The single district office cannot be justified as an appropriate unit under traditional criteria and the Board's *post hoc* efforts to supplement the rationale of its unit determinations are without merit 30

1. a. The criteria traditionally applied by the Board do not support the single district office unit 31

   b. The district office is not an "analogue of the single manufacturing plant" 34

2. The lack of consistency in application of the Board's purported "geographic coherence" criteria exposes extent of organization as the true reason for its decisions 36

3. The correct test of the applicability of Section 9(c)(5) 39

APPENDIX A 1a

TABLE OF CASES AND OTHER AUTHORITIES

Cases:

Allstate Insurance Company, 109 NLRB 578 (1954) 20
Allstate Insurance Company, 118 NLRB 855 (1957) 20
American National Insurance Company, 69 NLRB 745 (1946) 18

PAGE

The Baltimore Life Insurance Company, 73 NLRB 848 (1947) 18
Matter of Botany Worsted Mills, 27 NLRB 687 (1940) 19
Briggs Manufacturing Co., 101 NLRB 284 (1952) 36
Burlington Truck Lines Company, Inc. v. United States, 371 U. S. 156, 167 (1962) 29, 34

Cooper v. Aaron, 358 U. S. 1, 17 (1958) 11

Farrington Manufacturing Co., 87 NLRB 1051 (1949) 36
Father & Son Shoe Stores, Inc., 117 NLRB 1479 (1957) 21, 31, 32

John Hancock Mutual Life Insurance Company, 57 NLRB 700 (1944) 17
John Hancock Mutual Life Insurance Company, 62 NLRB 240 (1945) 18
John Hancock Mutual Life Insurance Company, 64 NLRB 541 (1945) 18
Home Beneficial Association of Richmond, Va., 17 NLRB 1027, 1030 (1939) 16
Home Beneficial Life Insurance Co., 89 NLRB 392 (1950) 20
Home Beneficial Life Insurance Co., 98 NLRB 1053 (1952) 20

The Life Insurance Company of Virginia, 57 NLRB 279 (1944) 17-18
The Life Insurance Company of Virginia, 62 NLRB 1444 (1945) 18
The Life Insurance Company of Virginia, 123 NLRB 610 (1959) 20, 21, 31, 32

PAGE

Metropolitan Life Insurance Co. (Chicago), 144 NLRB 149 (1963) 37
Metropolitan Life Insurance Co. (Cleveland), 138 NLRB 512 (1962) 37
Metropolitan Life Insurance Co. (Cleveland) v. N. L. R. B., 330 F. 2d 62 (6th Cir. 1964) 5
Metropolitan Life Insurance Co. (Detroit), 146 NLRB 184 (1964) 37
Metropolitan Life Insurance Co. (Sioux City), 138 NLRB 734 (1962) 36
Metropolitan Life Insurance Co. (Wilmington) v. N. L. R. B. (3rd Cir.), 328 F. 2d 820 5
Metropolitan Life Insurance Co., 43 NLRB 962, 966-7, 965 (1942) 7, 10, 17
Metropolitan Life Insurance Co., 54 NLRB 585, 588. (1944) 16
Metropolitan Life Insurance Co., 56 NLRB 1635, 1638, 1642 (1944) 10, 16, 17, 22, 25
Metropolitan Life Insurance Co., 64 NLRB 396 (1945) 18
Metropolitan Life Insurance Co., 138 NLRB 512 (1962) 23
Monumental Life Insurance Company, 60 NLRB 510 (1945) 18
Monumental Life Insurance Company, 62 NLRB 1200 (1945) 18
Monumental Life Insurance Company, 75 NLRB 776 (1948) 20
Monumental Life Insurance Company, 77 NLRB 432 (1948) 20
Murray Corporation of America, 101 NLRB 313 (1952) 35

N. L. R. B. v. Glen Raven Knitting Mills, 235 F. 2d 413, 416 (4th Cir. 1956) 40

PAGE

N. L. R. B. v. Quaker City Life Insurance Co., 319 F. 2d 690, 696 (4th Cir. 1963) 23
The National Life and Accident Insurance Company, 57 NLRB 1119 (1944) 18
The National Life and Accident Insurance Company, 58 NLRB 439 (1944) 18
New England Silk Co., 11 NLRB 852 (1939) 19, 24, 25, 35
Northeast Airlines, Inc. v. C. A. B., 331 F. 2d 579, 586 (1st Cir. 1964) 29

C. Pappas Company, Inc., 80 NLRB 1272 (1948) 36
Paxton Wholesale Grocery Co., 123 NLRB 316 (1959) 32
Peoples Life Insurance Company, 72 NLRB 1406 (1947) 18
Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 197 (1941) 29
The Prudential Insurance Company of America, 46 NLRB 430 (1942) 16
The Prudential Insurance Company of America, 49 NLRB 450, 456-7 (1943) 16
The Prudential Insurance Company of America, 61 NLRB 1289 (1945) 18
The Prudential Insurance Company of America, 80 NLRB 1583 (1948) 20

Quaker City Life Insurance Company, 73 NLRB 177 (1947) 18
Quaker City Life Insurance Co., 134 NLRB 960 (1961) 3, 10, 21, 22, 23, 24, 25, 30, 31, 36
Quaker City Life Insurance Co., 138 NLRB 61 26

Safeway Stores, Inc., 96 NLRB 998 (1951) 32
S. E. C. v. Chenery Corp., 318 U. S. 80, 94 (1942) 29

PAGE

Singer Sewing Machine Co. v. N. L. R. B., 329 F. 2d 200, 205 (4th Cir. 1964) 40

Supreme Liberty Life Insurance Company, 32 NLRB 94 (1941) 16

United Insurance Co., 108 NLRB 843 (1954) 20

Washington National Insurance Company, 57 NLRB 224 (1944) 17

Washington National Insurance Co., 64 NLRB 929 (1945) 18

Westbrook Enterprises, Inc., 79 NLRB 1032 (1948) 36

The Western and Southern Life Insurance Company, 57 NLRB 1439 (1944) 18

The Western and Southern Life Insurance Company, 65 NLRB 855 (1946) 18

Other Authorities:

House Labor Committee Report, H. Rep. No. 245, 80th Cong., 1st Sess., 37-38, 1 Leg. Hist. 328 2

House Minority Report No. 245 on H. R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. 328, 379-380 ..... 18, 19

National Labor Relations Act:

Section 9(b) 34

Section 9(c)(5) 1, 2, 10, 11, 12, 15, 17, 18, 20, 22, 23, 24, 25, 30, 35, 36, 39

NLRB Annual Report, 1961, p. 55 38

93 Cong. Rec. 6611, 2 Leg. Hist. 1537 18

93 Cong. Rec. 6656, 2 Leg. Hist. 1567 18

93 Cong. Rec. 7002, 2 Leg. Hist. 1625 19

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NATIONAL LABOR RELATIONS BOARD,

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—v.—

METROPOLITAN LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

Question Presented

Did the National Labor Relations Board, in violation of Section 9(c)(5) of the National Labor Relations Act, as amended, "make the extent to which the employees have organized . . . controlling" when it found a single district office an appropriate bargaining unit?

The Board's brief presents the question quite differently and, in our view, inaccurately. It includes the unwarranted and unsupported assertion that the Board's decision was "concededly proper on the reasons given by the agency". Who made the concession and when it was made is nowhere disclosed. The fact is that no such concession was ever

made either by respondent or by the court below, which felt "seriously handicapped in this case by the Board's failure to articulate specific reasons for its unit determination" (327 F. 2d at 909). Respondent has contended throughout this litigation that the Board's decision was improper and inconsistent with its own established criteria for the determination of an appropriate bargaining unit.

Statement

1.

Section 9(c)(5), first inserted in the National Labor Relations Act in 1947, prohibits the National Labor Relations Board, in its determination of an appropriate bargaining unit, from treating as "controlling" the extent to which the affected employees have been organized.

Before the enactment of Section 9(c)(5)—from the early days of the Board's existence and continuously until 1944—the Board had often certified single district office and city-wide units in the insurance business, as well as similarly fragmented units in other industries, repeatedly acknowledging as its purpose the acceleration of organizational efforts by labor unions. Extent of organization was thus often avowedly treated as controlling. Section 9(c)(5) was enacted for the express purpose of outlawing "a practice of the Board by which it has set up as units appropriat for bargaining whatever group or groups the petitioning union has organized at the time."[1]

[1] House Labor Committee Report, H. Rep. No. 245, 80th Cong., 1st Sess., 37-38, 1 Leg. Hist. 328.

2.

Thus, until 1944, the Board had uniformly found single district insurance office units appropriate, but solely and frankly on the basis of the unions' extent of organization. Then, for a period of seventeen years, the Board consistently found such units inappropriate, holding, in several post-1947 cases, that Section 9(c)(5) applied and precluded such a unit. In 1961 the Board, by a bare majority and for the first time in its history, found appropriate as a bargaining unit a single district insurance office for purported "reasons" other than extent of organization. *Quaker City Life Insurance Co.*, 134 NLRB 960 (1961).

Following *Quaker City*, the same Board majority has in this case, and in a series of companion cases certified a veritable hodge-podge of units, consistent only in the respect that each unit is the one demanded by the union and each is exactly co-extensive with the extent to which the employees have been organized.

In this case the Board majority held that a single Metropolitan district office in Woonsocket, Rhode Island (one of eight such offices operated by the Company in metropolitan Providence and of more than 1,000 in the United States) was an appropriate unit. The Union had attempted to organize all eight of the Company's district offices in metropolitan Providence. When that effort failed, the Union limited its petition to the single district office it had successfully organized. The Board's justification for non-inclusion of the other offices was that the nearest one was 12 miles away. Yet, in the companion cases the Board did not hesitate to include in one unit district offices as far as 30 miles away and "detached offices" in other states and as far as 284 miles from the district office.

Extent of organization, while sharply brought to the attention of the Board in each of these cases, and repeatedly mentioned and relied upon in the dissents of the two-member minority, was not mentioned by the Board majority in this case or in any of the companion cases.

The Board argues here that in finding that this one district office was "a separate administrative entity" and in excluding from the unit a district office twelve miles away, it did nothing more than apply its traditional and established criteria. Yet all the facts with respect to the administrative structure of the Company, the centralization of its operations, and the uniformity of the wages, benefits, hours and working conditions of its employees were identical in every material particular with the facts that repeatedly came before the Board before 1961 when the Board was repeatedly holding that a single district office was inappropriate except on the basis of extent of organization.

Even more revealing of the Board's principal reliance on extent of organization is the irrational pattern of unit determinations in companion cases.

The Board has in these cases certified a unit consisting of two out of a total of three offices in the State of Delaware; a unit comprising the entire metropolitan area of Detroit, including both urban and suburban offices; a smaller urban and suburban combination of offices in Cleveland; a unit consisting of 33 offices within the political city limits of Chicago, but excluding 14 offices in suburban Chicago, although a number of the city offices administer territories extending into Chicago suburbs and a number of the suburban offices administer territories extending into the city proper; a single district office in Sioux City, Iowa, together with two detached offices in Fargo, North Dakota and Sioux Falls, South Dakota—respectively 284 and 120 miles away

from Sioux City; and has found consistent with Board policy a unit consisting of the entire State of Massachusetts.

In each of these cases the Board majority has attempted a rationalization, always avoiding any mention of extent of organization. In each, the rationale is varied to support the particular facts. In each, the union obtains a determination that the appropriate unit is exactly the one it has requested. In each, the unit is precisely coincident with the extent to which the union has organized the employees. The combinations shift without pattern except that one thread runs through them all—extent of organization.

The court of appeals, looking at what the Board actually had done in these cases and acknowledging that it was disregarding what the Board majority had said and failed to say, could find no rational basis for these varying unit determinations by application of the Board's traditional or established criteria. It therefore concluded that the two-member Board minority had been right in finding that the majority had "indeed reverted to its pre-1944 policy of regarding the extent of union organization as controlling in violation of Section 9(c)(5) of the Act."[2]

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[2] In two companion cases, *Metropolitan Life Insurance Co. (Wilmington)* v. *N. L. R. B.*, 328 F. 2d 820, decided by the Third Circuit the day after the decision below, and *Metropolitan Life Insurance Co. (Cleveland)* v. *N. L. R. B.*, 330 F. 2d 62 (6th Cir.), both pending on petitions for writs of certiorari, No. 56 and No. 229 respectively, this Term, the courts reached contrary conclusions but in each instance decided the case as though it was an isolated one and without acknowledgment that in all other cases a rationale was always found by the Board to justify as appropriate the unit requested and the one exactly coincident with extent of organization. In both cases the courts accepted the Board's assertions that it was doing nothing more than applying its normal unit criteria when this was not so. (See Board Brief to Third Circuit, pp. 8-11, 30-31; Board Brief to Sixth Circuit, pp. 9-14, 33.)

3.

The Company does a nation-wide business through 1000 district offices (R. 284a), is administered from its home office in New York City (R. 38a-40a, 284a-285a) where business policy is formulated and from where it is uniformly applied (R. 53a-54a). For this purpose the Company is divided into fourteen territories each headed and supervised by a Superintendent of Agencies (R. 39a-42a). Rhode Island is part of the New England territory and contains eight district offices, all located in metropolitan Providence (R. 46a-47a, 177a, 189a).

Each district office is managed by a district manager whose functions and authority are severely limited. The supervisory officer is the Superintendent of Agencies in whom the only effective control and authority over district office operation is vested. While the manager maintains contact with the agents working out of his office, he has no authority to alter any of the Company's sales materials or the content of the educational meetings he conducts for the agents each Friday morning at the direction of the home office (R. 40a-43a, 116a-119a, 129a-132a, 144a-147a, 168a). Nor has he any authority to hire or fire agents or even clerks (R. 55a-56a, 117a). While he is encouraged to recommend new hires of agents, in practice one of every four of his recommendations has met with rejection (R. 55a, 179a).

He does not train his new agents. They are given instruction by home office representatives and when their course is completed the assistant district manager gives the new agent on-the-job training as prescribed in minute detail in Company training manuals (R. 56a, 219a-225a).

The district manager has no authority to dismiss or even to suspend any agent; only the Superintendent of Agencies has such authority (R. 57a-58a). In practice, in the New England territory, half the recommendations for

dismissal made by the district managers in 1961 were rejected by the Superintendent of Agencies (R. 57a, 179a). The district manager may not handle a grievance or even discuss one with an agent. Such grievances are filed with the Superintendent of Agencies in the first instance (R. 62a-63a). District managers play no role whatever in collective bargaining negotiations which have always been conducted by a committee consisting of the Superintendent of Agencies and other home office personnel (R. 61a-62a). The Company compensation plan and all employee benefit programs including vacations and leaves of absence are uniform throughout the nation and no district manager has any authority in any of these areas (R. 58a-59a, 66a-67a, 146a).

Despite this evidence, common to every insurance agent representation case decided by the Board in its entire history, the Board here purported to find "that each of Employer's individual district offices was in effect a separate administrative entity through which the Employer conducted its business operations, and therefore was inherently appropriate for purposes of collective bargaining" (R. 15a, note 2). That this was no more than *ad hoc* fiat will be demonstrated in Point II, *infra* (pp. 30-40). In fact, the district manager in this case had no greater function or authority than the Board found in any of the pre-1944 cases, typical of which was the case from which we quote in the margin.[3]

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[3] *Metropolitan Life Insurance Co.*, 43 NLRB 962, 966-7, 965 (1942):

> "In the United States the Company has, for administrative purposes, nine agency divisions, called territorial divisions, each representing a group of contiguous States. The State of Wisconsin is located in Territorial Division D, which includes the States of Wisconsin, Minnesota, Michigan, and Illinois. Each division is directly under a superintendent of agencies for that division, who is in turn responsible to the second vice president in charge of agencies. Each superintendent of agents

Historically, the Company has had an active history of collective bargaining. It now has state-wide collective bargaining agreements in Maryland, Minnesota, Missouri, New Jersey, Pennsylvania and Wisconsin. Insurance Workers International Union, AFL-CIO, the petitioning Union in this case, has company-wide, multi-state and many

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is the effective supervisory executive of all the district offices and office account offices in his division. Field training activities are conducted by the field training division which is divided into territorial divisions which correspond exactly with the agency territorial divisions. Each territorial division contains a number of offices of two main types known and referred to as district offices and office account offices, each under the direction of a manager and one or more assistant managers. In no case, however, do authorized agency points served by any district office or office account office include localities in more than one territorial division of the Company.

"All matters of general policy in the operation of the agency divisions of the Company are determined by the directors and officers of the Company at its home office. All applications for policies of insurance are accepted, postponed, or rejected at the home office and all policies are issued at the home office. All fiscal affairs of the Company are under the direct supervision and control of the home office. All investigations are authorized and approved by the home office. All agents are appointed by the Company at its home office, although applications are made at a local office. Preliminary training of the agent is generally done under supervision of the home office. Rates of earnings are determined by directors and officers at the home office and are uniform throughout the United States, for each of the various classes of agents. The forms on which, and the manner in which, the agents make their reports of fiscal transactions to the Company are prescribed, and from time to time changed, by the home office. The work of each agent is checked from time to time by the home office, which alone can adjust or compromise shortages, petty or otherwise, in the accounts of an agent. Managers have no authority to arrange sales drives or sales campaigns, nor have they authority to set quotas for an agent individually or for the office.

"The agent in one district office or office account office in Territorial Division D is in no different position from the agents in another district office or office account office in that division. Those factors which directly affect his work, such as collection, promotions, compensation, working conditions, rules and regulations, supervision, and termination are uniform throughout Territorial Division D. Agents may be and occa-

state-wide collective bargaining units with other insurance companies. The majority of its members are in state-wide or multi-state bargaining units (R. 227a, 328a, 341a).

The eight district offices in Rhode Island are all within metropolitan Providence (R. 189a, 275a, 279a). Working as actively in the other seven district offices as it had in Woonsocket, the Union attempted to organize all the Company's agents in Rhode Island. It sent written material and copies of the Union newspaper to the agents in the other offices, just as it did to those in Woonsocket. Personal contact was also made with agents in another office by an official representative of the Union (R. 28a).

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sionally are transferred to a different office at their own request, or with their consent at the request of the Company" (966-967).

As to local management the Board said (965):

"Regular agents and office account agents usually report to the district offices or office account offices at least 3 days each week, and in addition they are required to report once a week for educational meetings. On the days on which they report to the office they deposit premiums, turn in applications for new policies, and receive their mail and other communications. Among the facilities which the Company furnishes its agents at these offices are desks, mail boxes, stationery and forms, and advertising material, such as literature and calendars. The hours at which the agents report at the office are fixed by the district manager usually with reference to the time that the office is open to the public. Managers may occasionally call agents to the office at other times if they deem it necessary in the interest of service to the policyholders or in connection with other phases of the business. Agents are frequently accompanied on their debits by an assistant manager or representative of the field training division on training assignments in various phases of the business, and occasionally by an assistant manager or a representative of the field auditing division for the purpose of auditing an agent's account. Each agent is entitled in each calendar year to a vacation, the duration of which is determined by the home office and is uniform throughout the United States for all agents having the same length of service."

When the Union failed to organize the entire unit that would have been indisputably appropriate, i.e., the one consisting of the entire State of Rhode Island, it petitioned for the unit that has here been found appropriate.

4.

The pattern of facts revealed by the record in this case is in no material respect different from the pattern established in any one of the representation cases in the insurance business that have come before the Board since its creation. This applies to the pre-1944 cases (see, for example, *Metropolitan Life Insurance Company*, 43 NLRB 962, 966-7, 965 (1942) quoted *supra*, note 3), to the cases decided while the 1944 rule prevailed (see, for example, the 1944 *Metropolitan* case[4] itself), and to *Quaker City Life Insurance Co.*, 134 NLRB 960 (1961) and the cases that have followed it.

Yet in *Quaker City* and thereafter the Board has consistently ignored its own established criteria (the company's administrative structure, highly centralized operations and uniform wages, duties and working conditions), disregarded its former express deference to Section 9(c)(5), and in each instance approved the unit requested by the union which, also in each instance, coincided exactly with extent of organization. This is the course that has resulted in a variety of inconsistent unit determinations described in detail in Point II, *infra*, pp. 36-39.

5.

To test the validity of the Board's unit determination, the Company refused to obey the Board's order to bargain (R. 4a-11a) and petitioned the Court of Appeals for the

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[4] *Metropolitan Life Insurance Co.*, 56 NLRB 1635, 1638 (1944).

First Circuit for an order setting the Board's order aside (R. 360a). Respondent's petition was granted (R. 5-13) and the case is here on the writ of certiorari granted to the Board (—— U. S. ——, 33 U. S. Law Week 3128, October 13, 1964).

Summary of Argument

Section 9(c)(5) imposes restrictions on the otherwise broad discretion of the Board to determine appropriate bargaining units. Its legislative history recognizes that the Board, in earlier cases in which extent of union organization was the decisive factor, sometimes "pretended to find other reasons for its decision." If the statute is to have any meaning or vitality, judicial review of Board action must look behind the reasons asserted by the Board and seek the reality of what the Board has done.

This Court has not hesitated to look through purported justifications of state action, whether attempted "ingeniously or ingenuously" (*Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958)), and determine what in fact has been done by the decision presented for review. A similar approach is required here if judicial review is to be meaningful; otherwise Section 9(c)(5) has been repealed by administrative action.

The court below took this approach by examining the *actions* of the Board majority and by refusing to limit itself to acceptance of the transparent justifications asserted by the Board majority. In the two companion cases in which petitions for writs of certiorari are now pending in this Court, the Third and Sixth Circuits fell into error by blinding themselves to the facts that would have compelled exposure of the true basis of the Board majority's actions.

The Board in this case and in the companion cases arrived at conclusions indistinguishable from those that prevailed in cases decided before 1944 in which it frankly admitted that its decisions were controlled by extent of organization. Section 9(c)(5) outlawed such a basis for the determination of an appropriate bargaining unit and the Board has now tried to reinstate the same result for the same reason, changing the process only by attempting to disguise the reason. The court below stripped away the disguise and compelled obedience not only to the statutory language but to the expressed legislative purpose that extent of organization "should have little weight".

The Board's effort to reconstruct a foundation for its decision in this case by reference to "traditional criteria" fails for the simple reason that the decision in this case did violence to those very criteria. The Board has traditionally included in its appropriate collective bargaining units all employees within the category sought who perform their work within the employer's administrative division or area. Concomitantly the Board has uniformly rejected efforts to reduce the size of the unit to that headed by the lowest ranking supervisor whose function is limited to execution of company policy, centrally determined and closely controlled.

Contrary to the contention made for the first time in the court of appeals, the insurance company district office is not an "analogue to the single manufacturing plant". It has never been so held by the Board either in this or in any other case. In any event, the principles governing unit determinations in manufacturing plants would, if applied here, lead only to the conclusion sought by respondent, i.e., that the single district office was found to be an appropriate unit only by treating extent of organization as controlling.

The geographical coherence doctrine, now being applied by the Board to insurance agent representation cases, is easily exposed as subterfuge. The court below put it quite mildly when it held that this criterion has not been "consistently applied by the Board".

The record of Board decisions shows that, on a purported metropolitan area concept, it included urban and suburban offices in one unit in both Cleveland and in Detroit. In the case of Detroit, the Board reached out thirty miles to include a suburban office and fifty-seven miles to include a detached office. The Board did not hesitate, however, when the Union requested it, to do violence to the metropolitan area concept in Chicago where the unit was limited to urban district offices although district office territories crossed municipal lines at several points and, in one instance, an excluded suburban office was only six city blocks away from an included urban office.

In this connection, the Board achieved ultimate absurdity in its slavish submission to extent of organization when in Sioux City it included in one unit a district office in one state detached offices located in two other states at distances 120 and 284 miles away from the district office. And in this case, the Board majority refused to include in the unit any of the seven other district offices, all located in metropolitan Providence, because the nearest was 12 miles away.

The Board says that the statute can be violated only if its unit determination was based *solely* on the extent of organization "in the absence of other criteria of appropriateness." It seeks thus to avoid the real issue presented: Did the Board majority give controlling weight to extent of organization?

Nothing in the language of the statute or in the legislative history supports the Board's proposition. Congress did not limit its command to a prohibition against making extent of organization the "sole" basis for its decision.

The presence of other valid criteria may, of course, shed some light on the Board's controlling motivation in a particular case. But flagrant disregard of established Board precedent, a commitment to extent of organization factor early in the history of Board action in the insurance industry, and an inconsistent and wholly irrational pattern of decisions in contemporaneous insurance cases, are even more relevant to the resolution of the question of statutory violation.

Once this Court comes to accept the conclusion of the court below that the Board has here treated extent of organization as controlling and has thus flouted the express command of the statute, it will have no occasion to comb through the record to find some other justification for the Board's conclusion in this case.

ARGUMENT

POINT I

The court below correctly discerned that, in defining the bargaining unit, the Board had violated Section 9 (c) (5) of the Act by treating as controlling the extent to which the employees had organized.

Presented here is one of a series of cases decided since 1961 and indistinguishable on any of their material facts from the series of cases decided by the Board up to 1944. The Board arrived at identical results in both groups of cases, the only difference being that in the pre-1944 cases the Board treated extent of organization as controlling and acknowledged that it was doing so, whereas in the series beginning in 1961 it has treated extent of organization as controlling *sub silentio*.

Between the two series there intervened the Congressional mandate which the court below has held to have been violated by the Board in this case. The Board decision itself ignored the statute, not only in deed but also by its omission even to refer to it, notwithstanding that a two-member minority forcefully pointed up the problem. In its brief here, it attempts to supplement that decision by *post hoc* reasoning which, when stripped of its obfuscation, is nothing more than an admission that extent of organization was in fact the factor that controlled its decision, in this case and in the entire current series of cases.

In this point we trace the history of the problem to show that the conclusion arrived at by the court below was inescapable.

1. *Development of the 1944 Metropolitan Insurance Rule.*—Before 1944 it had been acknowledged by the Board that "the ultimately appropriate unit of insurance agents is the company-wide unit; and we have established less comprehensive units *solely on the basis of the limited extent of self-organization among the employees affected.*"[5]

Typical is *Metropolitan Life Insurance Company,* 54 NLRB 585, 588 (January 1944), where the Board said:

> "Upon the basis of the limited *extent of self-organization* among the employees involved, we have found appropriate, in a substantial number of cases, units such as the one here sought by the Union. We believe that these considerations are *controlling* in the instant case and that a unit confined to the Company's District Offices in the St. Louis metropolitan area is presently appropriate." (Emphasis added.)

Later that year, satisfied that organization was then proceeding at a sufficiently rapid pace, the Board changed its policy and announced that thenceforth the smallest appropriate unit would be state-wide. It did so on facts which, so far as administrative organization and method of operation of the Company were concerned, were identical in all material respects with those revealed by the instant record. In establishing its new rule, the Board said (*Metropolitan Life Insurance Co.,* 56 NLRB 1635, 1639 [June 1944]):

> "Based upon the *extent of organization* among employees of an employer, we have frequently found ap-

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[5] Emphasis added. *The Prudential Insurance Company of America,* 49 NLRB 450, 456-7 (1943). To the same effect: *Metropolitan Life Insurance Company,* 54 NLRB 585, 588 (1944); *Supreme Liberty Life Insurance Company,* 32 NLRB 94 (1941); *The Prudential Insurance Company of America,* 46 NLRB 430 (1942); *Home Beneficial Association of Richmond, Va.,* 17 NLRB 1027, 1030 (1939).

> propriate for bargaining purposes small groups of employees with a provision for revision of a unit upon a later showing of prior organization. We believe, however, that the principle upon which we have set up such units is not *controlling* in the instant case."[6]

In an earlier decision, *Metropolitan Life Insurance Company*, 43 NLRB 962, 968 (1942), the Board had found a state-wide unit appropriate because:

> "Insurance agents are licensed by their States. Requirements for a license vary greatly from one State to another. State Insurance Departments exercise varying degrees of supervision over the activities of agents and of companies. The insurance agents of each State are to this extent similarly situated. Furthermore, the feasibility of a Statewide unit is indicated by the fact that the agents of John Hancock Life Insurance Company and the agents of the Prudential Insurance Company in the State of Wisconsin are at present successfully engaged in collective bargaining."

In the period from 1944 continuously until the enactment of Section 9(c)(5) in 1947, the Board consistently refused to find a single district office or a city-wide unit appropriate, often stating as its grounds that such units could be appropriate only on the basis of extent of organization.[7]

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[6] Emphasis added. The quoted language appears in the Board's 1944 opinion immediately preceding the language quoted by it in its present brief to this Court (pp. 22-23). The use of the word "controlling" in juxtaposition with the term "extent of organization" suggests a possible source for the terminology which found its way into Section 9(c)(5).

[7] *Metropolitan Life Insurance Company*, 56 NLRB 1642 (1944); *Washington National Insurance Company*, 57 NLRB 224 (1944); *John Hancock Mutual Life Insurance Company*, 57 NLRB 700 (1944); *The Life Insurance Company of Virginia*, 57 NLRB 279

2. *The enactment of Section 9(c)(5).*—Section 9(c)(5), enacted in 1947, expressly forbids the Board, when making unit determinations, from treating as controlling "the extent to which the employees have organized."

The legislative history of the subsection reveals Congressional awareness of what had theretofore developed in the insurance industry. For example, the House Minority Report written in opposition to the bill had argued that "[i]n many industries, notably *insurance* and similar far-flung enterprises covering many States, organization can proceed only piecemeal and to deny collective bargaining in those areas in which organization has been achieved is to deny it entirely." (Emphasis added.) (House Minority Report No. 245 on H. R. 3020, 80th Cong. 1st Sess., 1 Leg. Hist. 379-380.) Similarly, Senators Morse and Murray, arguing against the enactment, pointed out that this section would make organization in the insurance industry difficult for unions because this industry had previously been organized only on the piecemeal extent-of-organization practice (93 Cong. Rec. 6611, 2 Leg. Hist. 1557; 93 Cong. Rec. 6656, 2 Leg. Hist. 1567).

(1944); *The National Life and Accident Insurance Company*, 57 NLRB 1119 (1944); *The Western and Southern Life Insurance Company*, 57 NLRB 1439 (1944); *The National Life and Accident Insurance Company*, 58 NLRB 439 (1944); *Monumental Life Insurance Company*, 60 NLRB 510 (1945); *The Prudential Insurance Company of America*, 61 NLRB 1289 (1945); *John Hancock Mutual Life Insurance Company*, 62 NLRB 240 (1945); *Monumental Life Insurance Company*, 62 NLRB 1200 (1945); *The Life Insurance Company of Virginia*, 62 NLRB 1444 (1945); *Metropolitan Life Insurance Company*, 64 NLRB 396 (1945); *John Hancock Mutual Life Insurance Company*, 64 NLRB 541 (1945); *Washington National Insurance Co.*, 64 NLRB 929 (1945); *Western and Southern Life Insurance Company*, 65 NLRB 855 (1946); *American National Insurance Company*, 69 NLRB 745 (1946); *Peoples Life Insurance Company*, 72 NLRB 1406 (1947); *Quaker City Life Insurance Company*, 73 NLRB 177 (1947); *The Baltimore Life Insurance Company*, 73 NLRB 848 (1947).

Answering these critics, Senator Taft pointed out that the section "overrules the 'extent of organization' theory sometimes used by the Board" (93 Cong. Rec. 7002, 2 Leg. Hist. 1625).

The Board, said the House Majority Report on the bill, "may take into consideration the extent to which employees have organized, [but] this evidence *should have little weight*, and, * * * is not to be controlling" (emphasis added; House Majority Report No. 245 on H. R. 3020, 80th Cong. 1st Sess., 1 Leg. Hist. 328).

In the same Report, Congress criticized the practice of the Board under which it "pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate. (*Matter of New England Silk Co.*, 11 NLRB 852 (1939); *Matter of Botany Worsted Mills*, 27 NLRB 687 (1940))."

To the same effect is the statement of Senator Taft quoted at pages 13 and 14 of the Board's brief in the present case. Indeed, the sentence containing the language italicized by the Board in its brief especially supports our view. It criticizes the Board, as we do here, for having surrendered its duty to determine appropriate units by using the extent-of-organization theory "to give the union what it desires." There can be no dispute with Senator Taft's proposition that, in a given case, "valid tests" may "justify the finding of a small unit." The short answer to the citation of that language in the Board's brief is that, as the court below found the test which controlled in this case was extent of organization.[9]

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[8] In the respect that the Board, in the *New England Silk* case "pretended" not to be controlled by extent of organization, that case is quite similar to the case at bar. See discussion, *infra*, pp. 24-25.

[9] "We are seriously handicapped in this case by the Board's failure to articulate specific reasons for its unit determination. . . .
(footnote 9 continued on following page)

3. *Board policy from the enactment of Section 9(c)(5) until 1961.*—Since the Board had stopped applying its extent of organization rule to the insurance industry in 1944, Section 9(c)(5) had no immediate impact on that industry. The Board continued to certify as appropriate only statewide units, *Monumental Life Insurance Co.*, 75 NLRB 776 (1948), *Monumental Life Insurance Co.*, 77 NLRB 432 (1948), *The Prudential Insurance Company of America*, 80 NLRB 1583 (1948), *Home Beneficial Life Insurance Co.*, 89 NLRB 392 (1950), *Home Beneficial Life Insurance Co.*, 98 NLRB 1053 (1952), *United Insurance Co.*, 108 NLRB 843 (1954), *Allstate Insurance Company*, 109 NLRB 578 (1954), *Allstate Insurance Company*, 118 NLRB 855 (1957), *The Life Insurance Co. of Virginia*, 123 NLRB 610 (1959).

In the *United Insurance* case, the Board refused to divide Pennsylvania into two bargaining units for agents (one for Philadelphia and one for the rest of Pennsylvania) because the requests for such units "appear to be based solely on the extent of organization, and under Section 9(c)(5) of the Act this factor cannot be given controlling effect" (108 NLRB at 848). It is to be noted that the petition in the *United Insurance* case was dismissed because the union's *requests* were based on extent of organization. In the case at bar as well as in the companion cases on which petitions for writs of certiorari are now pending, it is admitted that the Union's requests were based on extent of organization; the Board denies only that its determination was controlled by that factor.

"... the criterion of location in a separate and distinct geographical area is not a criterion consistently applied by the Board. ..." (327 F. 2d 906, 909).

The court below found first-blush plausibility in the Board's use of the "geographic appropriateness" yardstick, but such plausibility faded, said the court, upon consideration of the Board majority's decisions in other recent *Metropolitan Life* cases (327 F. 2d at 910).

The last of the pre-1961 cases, *The Life Insurance Company of Virginia*, 123 NLRB 610 (1959), is most revealing. There, the Board dismissed a petition for a unit consisting of a single district office because, as is true in the case at bar and in all the cases decided since *Quaker City*, the employer's operations were conducted on a state-by-state basis, working conditions were centrally determined, all agents though recruited locally were hired subject to home office approval, and all enjoyed the same employee benefits. Finding that the unit requested by the union was based upon its extent of organization, the Board dismissed the petition because it was "precluded by Section 9(c)(5) of the Act from according controlling effect to this factor as the petitioner is asking it to do here" (123 NLRB at 612).

Board Member Fanning, in a separate opinion, stated that he did not feel bound to dismiss because of the 1944 rule but concurred because of the inappropriateness of a single district office as a bargaining unit. He said (pp. 614-615):

> "I would apply to units of insurance agents the same criteria of appropriateness the Board applies to units in retail establishments, such as the administrative structure of the Employer's operations, geographical separation, centralization of operations, interchange of personnel, and uniform wages, duties, and working conditions. (See, for example, *Father & Son Shoe Stores, Inc.*, 117 NLRB 1479.)
>
> "In the present case, on the facts detailed in the majority opinion I would find that the unit sought does not conform to an administrative division of the Employer's organization, that the operations are highly centralized, and that the wages, duties, and working

conditions are uniform as far as possible throughout the Employer's organization. Accordingly, I would and do find that a unit limited to Danville, Virginia, is inappropriate."

4. *Reversal of Board policy in the Quaker City case.*— Two years later, giving no reason for the change in his view, Member Fanning joined two other members of the Board to reverse the state-wide rule that had prevailed since 1944. The majority, so constituted, held in *Quaker City Life Insurance Co.*, 134 NLRB 960 (1961), that a single district office unit was appropriate for collective bargaining.[10]

In announcing its new policy, the Board majority expressly acknowledged that it had until then uniformly followed the policy of *Metropolitan Life Insurance Company*, 56 NLRB 1635 (1944). It did not, however, so much as mention extent of organization or the existence of Section 9(c)(5) of the Act.

Indeed, its reasoning in *Quaker City* was entirely inconsistent with that Congressional mandate. For it pointed out that the *Metropolitan Life* rule had been adopted "*solely* in anticipation of broader organization on a company wide or state wide basis, which at that time appeared imminent. As a practical matter, however, such state wide or company wide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance agents." This, the Board asserted, gave rise to a "valid reason for changing the rule" (134 NLRB at 962).

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[10] Board members Rogers and Leedom dissented in *Quaker City*, seeing "no valid reason for departing from the *Metropolitan Life* rule which the Board adopted in 1944."

This was just another way of saying what Senators Morse and Murray had said in the 1947 congressional debates (*supra*, p. 18) and was an almost explicit flouting of the legislative mandate. In the language of Judge Boreman, dissenting, in *N. L. R. B.* v. *Quaker City Life Insurance Co.*, 319 F. 2d 690, 696 (4th Cir. 1963):

> "It is quite clear that the reason for the Board's decision to change the policy of Metropolitan is that it is easier to organize the small local district offices one at a time and thus eventually spread to a state-wide or company-wide group as a single unit."

Quaker City was followed by *Metropolitan Life Insurance Company*, 138 NLRB 512 (1962). In that case, the Board majority found appropriate a unit consisting of insurance agents employed in nine different district offices located in the Cleveland metropolitan area. No recognition of the Board's duty under Section 9(c)(5) was anywhere acknowledged, although this point was strongly argued. The Board granted the unit requested by the union, stating that it was basing its determination on geographical considerations. Two Board members dissented, adhering to their position in *Quaker City* and holding (p. 516):

> "It seems clear that the only justification for this finding is the geographic location of the offices. We believe this to be no reason for granting this unit. As the majority notes, each of these different district offices operates independently of another, the debit agents in each have separate, immediate supervision, there is no contact among the debit agents of the different offices either on a business or social level. In our view, the debit agents in these different offices do not have a community of interest with respect to the unit sought. Thus the unit which the majority finds appropriate

appears to be based upon the Union's extent of organization of these debit agents."

There have followed scores of Board decisions collected in Appendix A to this brief in which the unit certified was the one requested by the Union and the one marking the limits of the extent to which organization had succeeded. The inconsistency in the "geographic considerations" applied in these cases are discussed elsewhere in this brief (*infra* p. 36) and are there made painfully apparent.

5. *The true rationale of the Board majority in Quaker City.*—There is little to choose between the reasoning of the Board in its pre-1944 decisions in which inappropriate units were established based frankly upon extent of organization, and the reasoning in *Quaker City* and in the instant case. In both of the latter two cases extent of organization is not even mentioned but the unit determination is made so as not "to arrest the organizational development of insurance agents." Both cases are but part of the effort to treat extent of organization as controlling while pretending to find other reasons for the decision in this and the companion cases.

This point can perhaps be best illustrated by reference to a specific case which was before Congress when it was dealing with Section 9(c)(5). It will be recalled that the House Committee cited *Matter of New England Silk Co.*, 11 NLRB 852 (1939), as an example of a case in which the Board "pretends to find reasons other than the extent to which the employees have organized" for holding units to be appropriate. In that case, as in this one, the Board found appropriate separate units when the plants involved were only seven miles apart, matters of policy were determined in the executive offices of the company, payroll records

were made up in the executive offices, working conditions were uniform and fixed in the central office of the company, each plant had its own superintendent and hired its own help, and there was no social intermingling between plants.

The express Congressional disapproval of the Board's holding in *New England Silk* is the clearest expression that Section 9(c)(5) was intended to divest the Board of power to find appropriate a unit such as the one approved in the present case, in which the Board found that the Company's "policies and procedures are established at the home office"; the Superintendent of Agencies "has the responsibility for seeing that the offices in his territory operate in accordance with these company directions"; all "labor relations policies are established at the home office and all agents are subject to the same wage policies, employee benefits and working conditions" (138 NLRB at 566, 567). The Board majority's statement that the district manager exercises a degree of supervision of his office, is even less cogent than the finding in *New England Silk* that each plant had its own superintendent and hired its own help.

6. *The basis for the refusal of the court below to enforce the Board's order.*—The court of appeals in its opinion traced the history of Board decisions in insurance agent representation cases and found that the "Board's policy for determining appropriate bargaining units of debit insurance agents has not been consistent over the years" (327 F. 2d at 907). It contrasted the 1944 *Metropolitan Life* decision (56 NLRB 1635) with the 1961 decision in *Quaker City* (134 NLRB 960) in which the Board had announced, as the sole reason for overruling 1944 *Metropolitan Life*, that that "rule was adopted for the purpose of permitting organization on a statewide or employerwide basis, which did not develop as anticipated."

The court then examined some of the unit determinations made by the Board since *Quaker City*[11] (327 F. 2d at 908-909):

> "In subsequent cases a majority of the Board, with the same two members dissenting, certified as appropriate units consisting of nine of Metropolitan's district offices in the Cleveland, Ohio, metropolitan area (six offices in the City and three suburban offices eight or nine miles distant), *Metropolitan Life Ins. Co.*, 138 NLRB 512 (1962) [unfair labor practice decision, 141 NLRB No. 96 (1963)] *on appeal to Sixth Circuit*, Case No. 15366; two of Metropolitan's three district offices in Delaware, *Metropolitan Life Ins. Co.*, 138 NLRB 565 (1962) [unfair labor practice decision, 141 NLRB No. 37 (1963)] *on appeal to Third Circuit*, Case No. 14390, 328 F. 2d 820. Metropolitan's single district office in Sioux City, Iowa, together with two detached offices under its administrative control in Fargo, North Dakota, and Sioux Falls, South Dakota, 284 and 120 miles distant, respectively, from Sioux City, *Metropolitan Life Ins. Co.*, 138 NLRB 734 (1962); and all of Metropolitan's district offices within the political limits of the City of Chicago, thereby excluding suburban offices even though six of the thirty-three city district offices had territories extending beyond the city limits and three of the fourteen suburban offices had territories extending into the city. *Metropolitan Life Ins. Co.*, 144 NLRB No. 15 (1963). In *Equitable Life Ins. Co.*, 138 NLRB 529 (1962), the Board determined ap-

[11] The order directing Quaker City to bargain in a single district office unit (138 NLRB 61) had by then already been enforced by the Fourth Circuit (319 F. 2d 690), Judge Boreman dissenting on the ground that extent of organization had controlled the Board decision.

propriate a unit consisting of two district offices in Cleveland, Ohio, with a detached office in Lorain, Ohio, 28 miles away. And in this case the Board majority relying on prior decisions determined that one district office out of eight in a small densely populated state constituted an appropriate bargaining unit. The two dissenting members of the Board merely referred to their dissents in the *Quaker City Life Ins. Co.* case and in others in which they had not only reiterated that they saw no reason to depart from the policy established in the *Metropolitan Life* case of 1944, but had said that it appeared to them that the majority's unit determination was based upon the union's extent of organization of the debit agents involved."

The court recognized the broad discretion vested in the Board in unit determination cases but acknowledged its duty not to "overlook or ignore an evasion by the Board of the command laid upon it by §9(*c*)(5)." Turning to the Board's purported justification for its decision in the specific case before it, the court held that: "the criterion of location in a separate and distinct geographical area is not a criterion consistently applied by the Board as its decisions in Metropolitan's Cleveland and Chicago cases cited herein above clearly demonstrate" (327 F. 2d at 909).

After examining closely the Board's Cleveland and Chicago decisions, it noted (327 F. 2d at 910):

> "Why there should be a community of interest among Metropolitan's agents working from both city and suburban offices in Cleveland but no community of interest among its agents working in both city and suburban offices in Chicago is not explained by the Board majority and is beyond our comprehension.

"The Board majority in this case did not discuss what weight, if any, it gave to the factor of extent of union organization. Nor indeed has the majority done so in any of its decisions since *Quaker City*.

"Looking at its actions, however, we have not found a single instance since *Quaker City* wherein the majority of the Board refused the debit insurance agent unit petitioned for by the Union. We would not consider this fact alone decisive for we would hesitate to assume that the Board was subservient to the Union. Yet we believe this fact is entitled to considerable weight in the light of the testimony of the Union's vice-president in Metropolitan's Cleveland case, *supra*, which was incorporated by stipulation in the record in the instant case, that if the Union did not succeed in organizing on a broader basis it would as a matter of policy petition for a unit 'on a district basis.'"

Finally, the court held (327 F. 2d at 910-911):

"In the absence of any statement by the Board majority of any other rational basis for its varying unit determinations, we can only conclude that the two member Board minority is correct in its charge that the majority has indeed reverted to its pre-1944 policy of regarding the extent of union organization as controlling in violation of §9(c)(5) of the Act."

In so holding, the court realistically applied the Board's purported geographical yardstick against its actual unit determinations in the companion cases. That test revealed that geography was serving the Board merely as an excuse to permit extent of organization to control decision in each case.

The court's determination to look behind the words of a Board decision to find its true rationale is not unprecedented. To have done otherwise would have been nothing more than blind subservience to the kind of expertise that has already been characterized by this Court as a potential "monster":

> "Expert discretion is the lifeblood of the administrative process, but 'unless we [the Court] make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' [citing cases] . . . 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.'." *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 167 (1962). See also *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 94 (1942); *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197 (1941); *Northeast Airlines, Inc.* v. *C. A. B.*, 331 F. 2d 579, 586 (1st Cir. 1964).

In the name of expertise, the Board majority has again been guilty of the charge leveled against it by the House Committee when it said that the Board "pretends to find reasons other than the extent to which the employees have organized as grounds for holding such units to be appropriate", *supra*, p. 19.

The court below correctly saw through that pretense and refused to enforce the Board's order.

POINT II

The inconsistent application of the Board's new geographic coherence doctrine irrefutably proves that extent of organization controlled its decision here. The single district office cannot be justified as an appropriate unit under traditional criteria and the Board's *post hoc* efforts to supplement the rationale of its unit determinations are without merit.

The Board's efforts, in its brief to this Court and in its *post hoc* decision in *Metropolitan Life (Meriden and New London)*, to support its decision in this case by reference to "traditional criteria" are simply not borne out by Board precedents either in the insurance industry or in any other industry. The argument, made below for the first time, that the district office is the "analogue of the single manufacturing plant" is also unable to survive comparison with earlier Board decisions (Sub-point 1, *infra*).

The doctrine of "geographic coherence", applied to the insurance business for the first time in *Quaker City*, becomes a transparent pretense when considered in the light of the geographical facts in the various cases in which the units found appropriate coincided exactly with the extent of the union's organization (Sub-point 2, *infra*).

Section 9(c)(5) denounces as unlawful the determination of an appropriate unit by treating extent of organization as controlling. If some theory other than extent of organization could now be discovered to support the unit found, a determination which runs afoul of the subsection would still not be saved. There is, therefore, no merit in the Board's suggestion that Section 9(c)(5) is violated only when the unit determination is based *solely* on the extent of organization (Sub-point 3, *infra*).

1. a. *The criteria traditionally applied by the Board do not support the single district office unit.*—We have already called attention to the fact that, before 1961, the only cases in which the Board ever found a single district insurance office to be an appropriate bargaining unit were those decided before 1944, avowedly because of extent of organization.

We are now told that such a unit can be justified by "traditional criteria", and this makes it relevant to inquire what in fact were the traditional criteria by which the Board, before *Quaker City*, determined appropriate units in the insurance and other industries. Such inquiry need go no further than the two brief paragraphs from the concurring opinion of Board Member Fanning in *The Life Insurance Company of Virginia*, which we have quoted, *supra*, pp. 21-22.

In his succinct summary of the applicable rules, Member Fanning said that the criteria of appropriateness traditionally applied to units in retail establishments should also be applied to insurance agents. He listed these as: the administrative structure of the employer's operations, geographical separation, centralization of operations, interchange of personnel, and uniform wages, duties and working conditions, citing, by way of example, *Father & Son Shoe Stores, Inc.*, 117 NLRB 1479 (1957).

He was unable to square the single district office with these criteria because such a unit did not conform to the administrative division of the *employer's organization*, because the *employer's operations* were highly centralized, and because the wages, duties and working conditions throughout the *employer's organization* were uniform as far as possible.

It cannot be contended that the facts in this case are in any material way different from those that existed in 1959

in *The Life Insurance Company of Virginia* case. In fact, as we have already pointed out (*supra*, pp. 7, 16), there are no material differences in these respects among any of the insurance agent representation cases that have come before the Board since its creation.

The newfound Board pretext that the district office is "in effect a separate administrative entity" does violence to the meaning of that term as it had always been used by the Board in other cases. An "administrative entity" has always been defined by the Board as an administrative division of the employer's organization exercising effective supervisory authority over a group of smaller units within such a division, particularly with respect to labor relations, personnel, sales and advertising policies and decisions with respect to such matters as hiring, promotion, discharge, wage rates and employee benefits.

The *Father & Son* case (cited by Board Member Fanning), *Safeway Stores, Inc.*, 96 NLRB 998 (1951), and *Paxton Wholesale Grocery Co.*, 123 NLRB 316 (1959), are examples of the application of this principle to retail stores. Despite the fact that in each of those cases each individual store was headed by a manager, who had no less authority than did the district manager in this case, the unit determination in each case was governed by the employer's administrative groupings and not, as the Board would have it here, by the lowest common denominator of managerial authority.

As the Board said in *Safeway Stores* (96 NLRB at 1000-1):

> "The Board has frequently indicated that, absent unusual circumstances, the appropriate collective bargaining unit in the retail grocery trade should embrace all employees within the categories sought who perform

their work within the Employer's administrative division or area. There are no 'unusual circumstances' which would justify a contrary finding here. Although there is a substantial geographical separation of the Employer's retail outlets within its Waco District, it is clear that that factor does not present a barrier either to the successful functioning of the Employer's administrative organization or to an expression of the employees' unity of interests. We believe, therefore, that a unit comprising all meat department employees within the Employer's Waco District might well be appropriate."

The Company's administrative division, known as the New England Territory, consists of the district offices located in a group of contiguous states. The territory is under the direction of a Superintendent of Agencies who is the effective supervisory executive of all of the district offices within the territory. He is charged with the administration and effective control of recruitment, training, appraisal, appointment, transfer, promotion, demotion, retirement, abolishment of offices and business and sales promotion activities for each of the district offices. He is charged with the responsibility of having the agents and the manager of each district office conform to the policies and procedures promulgated both by himself and the home office. Control over all labor relations and personnel policies is highly centralized; compensation, employee benefits, duties and working conditions of all agents are uniform throughout the Company.

In the face of this extremely high degree of centralization, the Board found the district office appropriate based on the manager's purported authority. The authority relied on is that the manager is a supervisor, that, although he has no authority to hire or fire, he may recommend

(not always effectively) new hires, that he can accept an agent's resignation, that he explains Company directives and that he may make recommendations (not followed in most cases) concerning termination. These so-called reasons add up to nothing more than that the manager executes at the district office the directives of the Superintendent of Agencies.

Such a niggling search for miniscule indicia of "authority" cannot now serve as an adequate substitute for "traditional criteria".

b. *The district office is not an "analogue of the single manufacturing plant".*—Board counsel, for the first time in the court of appeals suggest as a reason for reversal, a theory never adverted to by the Board in any of its insurance decisions to this day. They say (brief pp. 18-19) that the single manufacturing plant "is the basic component of a manufacturing enterprise", that a plant unit would be valid under Section 9(b) of the Act, and that the district office is an equally valid unit because it is "the insurance industry's analogue" of the single plant.

Leaving aside the serious question whether counsel may thus ask the courts to accept their *"post hoc* rationalizations for agency action" (*Burlington Truck Lines Company, Inc.* v. *United States, supra,* 371 U. S. at p. 168), it is entirely clear that the plant unit principle has no relevance in the insurance industry.

Even in manufacturing plant cases, the Board has not certified a single plant of a multi-plant company where there was centralized control, uniformity of wages and working conditions and the other elements, which, as we have shown, have traditionally precluded single office or store units.

In industries other than insurance, the Board itself has dismissed a petition for a single plant unit when the true basis for certification of the unit would have been extent of organization; *Murray Corporation of America,* 101 NLRB 313 (1952). And the use by the House Committee of *New England Silk* in support of Section 9(c)(5), as we have pointed out (*supra,* pp. 24-25), is itself persuasive authority in support of our contention that the single plant unit cannot be employed to disguise the fact that extent of organization was the controlling factor which brought about the decision in this case.

In the *Murray Corporation* case, *supra,* the union had sought a unit of office and clerical employees at the company's plant in Ecorse, Michigan. The company took the position that the only appropriate unit was a combination of its two plants in that state located 14 miles apart. The Board, dismissing the petition as based on extent of organization, said (pp. 314-5):

> "The Ecorse plant, the only plant involved, in this proceeding, is located 14 miles from the Main plant. The two plants manufacture different products and have different plant managers. Both, however, are under the jurisdiction of the vice president in charge of the automotive division. Purchasing and general accounting for both are handled at the Main plant, and labor relations policies for both are established there.
>
> The Ecorse plant hires its own office and clerical employees. However, the evaluation, administration, and control of salaries for both plants are determined at the Main plant, and all salaried payrolls are prepared there. Classifications, with one exception, are the same at both plants; and employees in the same classifications have similar duties, skills, and rates of pay. Transfers from one plant to the other are made from

> time to time. All salaried employees have the same rights and privileges. Although there is no settled grievance procedure for these employees, problems relating to them, if not settled at the plant level, ultimately clear through the director of industrial relations, located at the Main plant."

To the same effect, see *Briggs Manufacturing Co.*, 101 NLRB 284 (1952), *Farrington Manufacturing Co.*, 87 NLRB 1051 (1949), *C. Pappas Company, Inc.*, 80 NLRB 1272 (1948), *Westbrook Enterprises, Inc.*, 79 NLRB 1032 (1948).

Thus, even if the manufacturing plant unit could be considered a proper "analogue" to the single district office, the latter would still not survive the test of Section 9(c)(5).

2. *The lack of consistency in application of the Board's purported "geographic coherence" criteria exposes extent of organization as the true reason for its decisions.*—In Appendix A to this brief, we list scores of cases in which, following *Quaker City*, the Board has found appropriate the unit sought by the union and the unit coinciding in each case with extent of organization. Recognizing its burden to reconcile these decisions, the Board says that "there is a reasonable degree of geographic coherence among the offices" grouped, because "the offices are not too distant and their territories are either adjacent or in reasonable proximity to one another" (Brief, p. 19).

A study of the cases discloses, however, that no such "coherence" is to be found. In the words of the court below, this "is not a criterion consistently applied by the Board" (327 F. 2d at 909).

For example, whereas in this case the Board refused to include in the unit an office located 12 miles away, in *Metropolitan Life Insurance Co.* (*Sioux City*), 138 NLRB 734

(1962), "detached offices" located in other states at distances 120 and 284 miles away were included in the unit.[12]

In *Metropolitan Life Insurance Co. (Cleveland)*, 138 NLRB 512 (1962), enforced 330 F. 2d 62 (6th Cir. 1964), pending on petition for writ of certiorari, No. 229, this Term, and in *Metropolitan Life Insurance Co. (Detroit)*, 146 NLRB 184 (1964), the Board appeared to be adopting a metropolitan area concept, including in single units both urban and suburban offices in each of these cities. Yet in Detroit, the Board reached out 30 miles to include a suburban office and 57 miles to include a detached office. In Cleveland, some city offices were as far as 16 miles from each other and the distance between two suburban offices was 18 miles.

The metropolitan area concept was entirely discarded, however, in *Metropolitan Life Insurance Co. (Chicago)*, 144 NLRB 149 (1963), where the control exercised by extent of organization was most flagrant. There, the Regional Director, assuming from the Board's decisions that a cohesive metropolitan area unit was proper, included both urban and suburban offices. The Board reversed, explaining that in Chicago, unlike Cleveland and Detroit, it would rely "upon the physical location of the individual offices (within the city) as the yardstick in determining the geographic appropriateness of the unit" (144 NLRB at 151).

Totally ignored was the fact that, in Chicago, some urban district offices had territories extending into the suburbs and that some suburban offices had territories extending

[12] A detached office, under the immediate supervision of an assistant manager, contains a group of agents who report to this office rather than to the district office. Contact between the detached office and the district office from which it is detached is "occasional" (R. 48a-49a) and obviously less frequent than the directives issued directly to the detached office by the Superintendent of Agencies.

into the city. Also ignored was the fact that one excluded suburban office was only six blocks away from an included urban office.

Later, at the Union's request, in three separate cases (Appendix A, Nos. 20, 23, and 41), three separate Chicago suburban district offices were found to be appropriate for bargaining in three separate units.

In another example, the Board approved a state-wide consent election in Massachusetts (Appendix A, No. 2), thus holding that even in 1962 a state-wide unit of insurance agents did not "contravene . . . established Board policy" (NLRB Annual Report, 1961, p. 55).

Respondent will, at the argument of this case, offer to the Court a tabulation listing the distance of the district office closest to each Metropolitan Life district office which has been found appropriate as a separate bargaining unit. The tabulation will reveal that in ten of those instances the unit found was within five miles from another district office not included in the unit.

In each of the foregoing cases in which the Board decision was reported, the Board majority states a purported rationale, never mentioning extent of organization, although in each case the unit found matches precisely the extent to which the employees have been organized. Not until after the decision of the court below in this case did the Board ever make any effort to explain its strange silence on the issue of extent of organization. This was the central issue before it and the heart of all the two-member dissents.

In giving the Union precisely what it asked for in this case, the Board took pains to note that "no union [was] seeking a larger unit" (R. 15a) and, judging from the results reached in the cases cited above, it seems fair to assume that, had this or any other union sought a larger unit, a larger unit would have been granted. That a request by

the Company for such a larger unit is always rejected shows that extent of organization has been treated as controlling and that in each of the cited cases, the Board has attempted to accomplish precisely what Congress forbade in Section 9(c)(5).

3. *The correct test of the applicability of Section 9(c)(5).*—By its statement on page 14 of its brief that Section 9(c)(5) "was merely intended to preclude the Board from basing its unit determination *solely*[13] on extent of organization in the absence of other criteria of appropriateness", the Board seems to be saying that even when extent of organization is treated as controlling, its decision should still stand if other factors can be found to support the unit determination made. Such an approach emasculates Section 9(c)(5) and renders sacrosanct any Board determination which could have survived attack, absent the enactment of the subsection.

The Board's argument overlooks the legislative history of Section 9(c)(5) which shows that it was the intent of Congress that: "While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight . . . "

Far from abiding by the clear Congressional intent that extent of organization must be given only little weight, the Board admittedly has been satisfied with whatever geographic coherence it could find to support the unit requested by the Union. Its brief here concedes (p. 19) that this was the process of decision by its statement that the Union's request has been granted whenever the offices sought to be included "are not too distant" from one another.

In short, "geographic coherence" exists in every case in which the Union groups more than one office in its petition

[13] Emphasis added.

for a unit. It disappears at the very point at which extent of organization ends.

The Board will, of course, never announce that it has treated extent of organization as controlling. When, however, its conduct renders inescapable the conclusion that it has done so, its determination must be set aside notwithstanding that a similar determination might have survived attack if extent of organization had not been treated as controlling. This was the holding in *Singer Sewing Machine Co.* v. *N. L. R. B.*, 329 F. 2d 200, 205 (4th Cir. 1964), where the court said that where

> "extent of organization was the controlling factor in the unit determination, . . . it would be no answer to the invalidity of an order having such a basis that the other factors which we have discussed in this opinion would support the unit determination which was made."

To the same effect, *N. L. R. B.* v. *Glen Raven Knitting Mills*, 235 F. 2d 413, 416 (4th Cir. 1956).

When this Court has considered the facts in this case in the context of the decisions the Board has been rendering over the last few years in closely related cases, we believe it will have no choice but to arrive at the conclusion that extent of organization has been treated as controlling in this and in the other cases. Having reached that conclusion, it will have no choice but to decline Board counsel's invitation to roam through the record seeking isolated facts to justify the conclusion the Board reached.

The fact that extent of organization was treated as controlling will alone compel it to approve the result reached by the court below.

The decree should be affirmed.

Respectfully submitted,

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January 8, 1965

APPENDIX A

Chronological List of Insurance Industry Cases Since *Quaker City*

In the following tabulation, the unit found appropriate in every case was the unit petitioned for by the Union. Each petition sought a unit exactly coextensive with the Union's extent of organization (see 327 F. 2d at 910 citing the testimony of Union's Vice President, R. 333a-334a). In every case the petitioner was the same Union, Insurance Workers International Union, AFL-CIO.

Location	Unit Found Appropriate	Company	Citation
1. Alexandria, Va.	Single district office in Alexandria	Quaker City Life Ins. Co.	134 NLRB 960 (1961, Representation Case), 138 NLRB 61 (1962, Unfair Labor Practice Case), enforced NLRB v. Quaker City Life Ins. Co., 319 F. 2d 690 (4th Cir. 1963).
2. State of Mass.	Entire state	Metropolitan Life Ins. Co.	Case No. 1-RC-6965 (1962, unreported).
3. Cleveland, Ohio	6 urban and 3 suburban offices consisting of metropolitan Cleveland	Metropolitan Life Ins. Co.	138 NLRB 512 (1962, Representation Case), 141 NLRB 1074 (1963, Unfair Labor Practice Case), enforced Metropolitan Life Ins. Co. v. NLRB, 330 F. 2d 62 (6th Cir. 1964) pending on petition for writ of certiorari, No. 229 this term.

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Company	Citation
4. Cleveland, Ohio	2 district offices located in Cleveland	Equitable Life Ins. Co.	138 NLRB 529 (1962, Representation Case), 141 NLRB 718 (1963, Unfair Labor Practice Case).
5. Wilmington, Delaware.	2 out of 3 offices in the State of Delaware, the 2 both in Wilmington area	Metropolitan Life Ins. Co.	138 NLRB 565 (Representation Case), 141 NLRB 337 (1963, Unfair Labor Practice Case), enforced Metropolitan Life Ins. Co. v. NLRB, 338 F. 2d 820 (2d Cir. 1964) pending on petition for writ of certiorari No. 56 this term.
6. Sioux City, Iowa	1 district office in Sioux City and 2 detached offices, one in Fargo, North Dakota, 284 miles away, the other in Sioux Falls, South Dakota, 120 miles away.	Metropolitan Life Ins. Co.	138 NLRB 734 (1962, Representation Case), 142 NLRB 28 (1963, Unfair Labor Practice Case).
7. Pittsburgh, Pa.	2 separate units for 2 single district offices out of 5 offices located in the Pittsburgh metropolitan area	The Western and Southern Life Ins. Co.	138 NLRB 538 (1962, Representation Case), 142 NLRB 28 (1963, Unfair Labor Practice Case).

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Company	Citation
8. Detroit, Michigan	8 urban and 9 suburban district offices located in metropolitan Detroit	Metropolitan Life Ins. Co.	Case No. 7-RC-5269 (1962, Representation Case unreported), 146 NLRB No. 184 (1964 Unfair Labor Practice Case).
9. Providence, R. I.	single district office located in a suburb of Providence, Rhode Island	Metropolitan Life Ins. Co.	Instant case.
10. Johnstown, Pa.	single district office	Knights Life Ins. Co.	Case No 6-RC-3187 (1962, Representation Case unreported).
11. Philadelphia, Pa.	single district office	Superior Life Ins. Co.	Case No. 4-RC-5115 (1962, Representation Case unreported).
12. State of Oklahoma	entire state	Farmers Insurance Group	143 NLRB 240 (1963, Representation Case).
13. Baltimore, Maryland	single district office	American Industrial Life Ins. Co.	Case No. 5-RC-4347 (1963, Representation Case unreported).
14. Petersburg, Va.	single district office	The Life Insurance Company of Virginia	Case No. 5-RC-3974 (1963, Representation Case unreported), 143 NLRB 1343 (1963, Unfair Labor Practice Case).
15. Chicago, Illinois	33 district offices located within the city limits of Chicago excluding 14 suburban offices	Metropolitan Life Ins. Co.	144 NLRB 1 (1963, Representation Case), 146 NLRB No. 116 (1964, Unfair Labor Practice Case).

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Company	Citation
16. Toledo, Ohio	3 district offices located in Toledo	Metropolitan Life Ins. Co.	Case No. 13-RC-9130 (1963, Representation Case unreported), 146 NLRB No. 113 (1963, Unfair Labor Practice Case).
17. Meriden, Conn.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-7313 (1963, Representation Case unreported), 147 NLRB No. 8 (1963, Unfair Labor Practice Case).
18. New London, Conn.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-7331 (1963, Representation Case unreported), 147 NLRB No. 8 (1963, Unfair Labor Practice Case).
19. Olean, New York	single district office	Metropolitan Life Ins. Co.	Case No. 3-RC-3120 (1963, Representation Case unreported).
20. Chicago, Illinois	single district office in a suburb of Chicago (Chicago Heights)	Metropolitan Life Ins. Co.	Case No. 13-RC-9768 (1963, Representation Case unreported), 148 NLRB No. 145 (1964, Unfair Labor Practice Case).
21. Holyoke, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-7730 (1963, Representation Case unreported).
22. Alton, Illinois	single district office	Metropolitan Life Ins. Co.	Case No. 14-RC-4792 (1964, Representation Case unreported).
23. Chicago, Illinois	single district office located in suburb of Chicago (Joliet)	Metropolitan Life Ins. Co.	Case No. 13-RC-9960 (1964, Representation Case unreported).

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Company	Citation
24. Richmond, Virginia	single district office	Durham Life Insurance Co.	Case No. 5-RC-4398 (1964, Representation Case unreported).
25. Amsterdam, New York	single district office	Metropolitan Life Ins. Co.	Case No. 3-RC-3526 (1964, Representation Case unreported).
26. Buffalo, New York	single district office	The Colonial Life Insurance Company of America	Case No. 3-RC-3342 (1964, Representation Case unreported).
27. Belleville, Illinois	single district office	Metropolitan Life Ins. Co.	Case No. 14-RC-4998 (1964, Representation Case unreported).
28. Cleveland, Ohio	two district offices	American Life & Accident Ins. Co. of Kentucky	Case No. 8-RC-5456 (1964, Representation Case unreported).
29. Beverly, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-8161 (1964, Representation Case unreported).
30. Bridgeport, Conn.	two district offices	Metropolitan Life Ins. Co.	Case No. 2-RC-13741 (1964, Representation Case unreported).
31. West Hartford, Conn.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-8041 (1964, Representation Case unreported).
32. Cohoes, New York	single district office	Metropolitan Life Ins. Co.	Case No. 3-RC-3461 (1964, Representation Case unreported).
33. Richmond, Virginia	city wide	Union Life Insurance Co.	Case No. 5-RC-4768 (1964, Representation Case unreported).

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Comp	Citation
34. E. St. Louis, Illinois	single district office	Metropolitan Life Ins. Co.	Case No. 14-RC-4963 (1964, Representation Case unreported).
35. Everett, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-8063 (1964, Representation Case unreported).
36. Gloversville, New York	single district office	Metropolitan Life Ins. Co.	Case No. 3-RC-3512 (1964, Representation Case unreported).
37. Hammond, Ind.	single district office	Metropolitan Life Ins. Co.	Case No. 13-RC-10427 (1964, Representation Case unreported).
38. Herkimer, New York	single district office	Metropolitan Life Ins. Co.	Case No. 3-RC-3442 (1964, Representation Case unreported).
39. Lynn, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-8042 (1964, Representation Case unreported).
40. Metropolitan New York	company's administrative division	State Farm Ins. Cos.	Case No. 2-RC-13563 (1964, Representation Case, unreported).
41. Chicago, Illinois	single district office located in a suburb of Chicago (Oak Lawn)	Metropolitan Life Ins. Co.	Case No. 13-RC-10156 (1964, Representation Case unreported).
42. Ottawa, Illinois	single district office	Metropolitan Life Ins. Co.	Case No. 13-RC-10416 (1964, Representation Case unreported).
43. Salem, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-7918 (1964, Representation Case unreported).

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Company	Citation
44. Sommerville, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-7930 (1964, Representation Case unreported).
45. Warren, Ohio	single district office	Metropolitan Life Ins. Co.	Case No. 8-RC-5755 (1964, Representation Case unreported).
46. Youngstown, Ohio	two district offices	Metropolitan Life Ins. Co.	Case No. 8-RC-5724 (1964, Representation Case unreported).

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 98

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

METROPOLITAN LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. The Company contends (Co. Br. 15–17, 24) that the only difference between the Board's practice in determining appropriate bargaining units for insurance agents prior to 1944 (when it established state-wide units) and its practice now, is that previously it acknowledged that it was relying on extent of organization, whereas now it relies on that factor *sub silentio*. We submit that the Company's contention rests on an erroneous premise. To be sure, in many of the cases prior to *Metropolitan Life Ins. Co.*, 56 NLRB 1625 (1944),[1] the Board, in establishing units

[1] In that case, the Board announced that it would not establish units for insurance agents smaller than state-wide in scope. Extent of organization was a factor in this decision, no less than in the preceding cases. See *Colonial Life Insurance Co.*,

721-545—65

ex[illegible]ng of a single district office, or groupings thereof, laid stress on the fact that the union had organized no further (see Co. Br. 16–17).[1] But at that time it was entirely proper for the Board to give controlling weight to extent of organization, and there was thus no occasion for it to consider whether the units were appropriate on other grounds as well. In 1961, when the Board, in *Quaker City Life Insurance Co.*, 134 NLRB 960, decided to abandon the artificial *Metropolitan* rule and to apply to insurance agents the same principles that it had been applying in other industries, it found that those principles permitted the establishment of smaller units for insurance agents without giving controlling weight to extent of organization (see Bd. Main Br. 15–22). In these circumstances, no adverse inference can be drawn from the fact that the units now established by the Board are in many respects similar to those which the Board established prior to 1944.

Nor is a different conclusion required by the circumstance that Section 9(c)(5) was opposed on the ground that it would impair the establishment of bargaining units in many industries, including insurance, where organization could proceed only on a piecemeal basis (Co. Br. 18). The fears of the opponents of a statutory provision are not a reliable guide to its meaning. See *National Labor Relations Board* v. *Fruit and Vegetable Packers*, 377 U.S. 58, 66. Moreover, Senator Taft, in

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42 NLRB 1177, 1180–1183 (1942); *Metropolitan Life Insurance Co.*, 43 NLRB 962, 969–970 (1942) (dissent of Member Reilly).

[1] Cf. however, the analysis of the facts concerning the distinctive nature of the district office, in *John Hancock Mutual Insurance Co.*, 26 NLRB 1024, 1033–1034 (1940).

reply to this contention, specifically stated that Section 9(c)(5) would not preclude the establishment of small units in industries like insurance, for such a unit might be justified on the basis of the other tests which the Board had evolved for determining appropriate units (Bd. Main Br. 13). In short, the purpose of Section 9(c)(5) was simply to prevent the Board from approving a unit which could be found appropriate on no other ground than that it coincided with the extent of union organization. It was not intended to interdict any particular form of unit which the Board had previously established even though it may have been based on extent of organization, provided the Board, on a reexamination of all the relevant facts, were now able to find that such unit satisfied other traditional criteria of appropriateness.

2. Contrary to the Company (Br. 34–36), the Board's practice in establishing units in the insurance industry under its *Quaker City* policy is consistent with its practice in establishing units in other industries. Thus in the case of multi-plant manufacturing concerns, the Board has found a single plant unit to be appropriate where the degree of separateness and autonomy of the plant was not substantially different from that of the individual district office in the insurance industry; and its reasons for declining to group that plant with other plants owned by the same company have been essentially the same as its reasoning in the insurance cases. See *General Shoe Corp.*, 109 NLRB 618, 619–621. See also, *e.g.*, the following cases in which the Board, while acknowledging that a larger unit might also

have been appropriate, found a single plant unit to be appropriate in view of the geographical separation between plants, the existence of intermediate supervision at the plant level, the lack of prior bargaining history on a multi-plant basis, and the fact that no union was seeking the larger unit: *Rose Marie Reid*, 103 NLRB 498 (company had 2 plants in Los Angeles, California, about 15 miles apart, both under centralized control); *Harris Langenberg Hat*, 106 NLRB 19, enforced 216 F. 2d 146 (C.A. 8) (company had 5 plants, the nearest 10 miles away, all under centralized administration and labor relations policy); *Wm. R. Whittaker Co., Ltd.*, 117 NLRB 339 (company had 2 plants within 20 miles of each other in California, both under centralized administration and labor relations policy); *Temco Aircraft Corp.*, 121 NLRB 1085 (company had 3 plants near Dallas, Texas, within 40 miles of each other, all under central administration and labor relations policy); *American Linen Supply Co., Inc.*, 129 NLRB 993, (company had laundries in New Haven, Stamford and Hartford, Connecticut and Springfield, Massachusetts, within 35 to 60 miles of each other, all under centralized management and labor relations policy).[3]

[3] The traditional criteria applied by the Board in the insurance industry since *Quaker City* are not the criteria previously used in the retail chain store field (Co. Br. 30-34); rather, they are the ones developed in dealing with multi-plant manufacturing concerns (Bd. Main Br. 18-19). Indeed, at about the same time as *Quaker City*, the Board in *See-On-Drugs*, 136 NLRB 1062, changed the rules the Company notes in its brief (Co. Br. 31-33), and the Board now applies the same basic

CONCLUSION

For these reasons, as well as those set forth in our opening brief, the judgment of the court below should be reversed and the case remanded with directions to enforce the Board's order in full.

Respectfully submitted,

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JANUARY 1965.

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rules developed in the manufacturing field to retailing as well as insurance.

The other cases cited by the Company (Co. Br. 35–36), are inapposite. The Board rejected a single plant unit in *Murray Corp. of America*, 101 NLRB 318, and *Briggs Manufacturing*, 101 NLRB 284, because the evidence in both cases indicated prior bargaining on a multi-plant basis and an interchange of employees between the plants. Neither of these factors indicating the propriety of a larger unit is present in the instant case (Bd. Br. 6, 7).

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